79-1166

Supreme Court, U. S.
FILED
JAN 28 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

PAUL A. SMITH,
Petitioner,

v.

WILSON FREIGHT COMPANY and
NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Paul Alan Levy
Arthur L. Fox II
Alan B. Morrison

Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

January 28, 1980

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

QUESTION PRESENTED 3

STATEMENT 3

A. Facts 3

B. Proceedings Below 8

1. NLRB 8

2. Court of Appeals 9

REASONS FOR GRANTING THE WRIT 11

The Decision Below Conflicts With Decisions of This and Other Courts and Creates a Significant Means for Denying Employees Their Statutory Rights 11

CONCLUSION 15

Appendix A 1a

Appendix B 36a

Appendix C 37a

TABLE OF AUTHORITIES

Page

Carey v. Westinghouse Electric Corp.,
375 U.S. 261 (1964) 9

Eastex, Inc. v. NLRB,
437 U.S. 556 (1978) 11, 12

Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) 10

Fruin-Colnon Corp. v. NLRB,
571 F.2d 1017 (8th Cir. 1978) 11, 13

General Motors Corp. v. NLRB,
512 F.2d 447 (6th Cir. 1975) 13

Mastro Plastics Corp. v. NLRB,
350 U.S. 270 (1976) 12

NLRB v. Eastern Smelting & Refining Corp.,
598 U.S. 734 (1st Cir. 1979) 9

NLRB v. General Motors Corp.,
373 U.S. 734 (1963) 13

NLRB v. Glenn Berry Manufacturers,
422 F.2d 748 (10th Cir. 1970) 11

NLRB v. IBEW Local 1229,
346 U.S. 646 (1953) 8

NLRB v. Magnavox Corp.,
415 U.S. 322 (1974) 3, 11, 12

NLRB v. Montgomery Ward & Co.,
554 F.2d 966 (10th Cir. 1977) 9

Radio Officers Union v. NLRB,
347 U.S. 17 (1954) 11

Page

Rust Engineering Co. v. NLRB,
445 F.2d 172 (6th Cir. 1971) 13

Vaca v. Sipes,
386 U.S. 171 (1967) 15

Statutes and Regulations

National Labor Relations Act,
29 U.S.C. §§ 151 *et seq.* 2
§ 7, 29 U.S.C. § 157 ..... 2, 8, 11, 12, 14
§ 8(a)(1), 29 U.S.C. § 158(a)(1) 2, 8
§ 8(a)(3), 29 U.S.C. § 158(a)(3) 2, 3, 8
§ 8(a)(4), 29 U.S.C. § 158(a)(4) 3, 8

Landrum-Griffin Act,
29 U.S.C. § 401 *et seq.* 15

28 U.S.C. § 1254(1) 2

29 C.F.R. § 1910.132 5

49 C.F.R. § 393.95(d) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

PAUL A. SMITH,
Petitioner,

v.

WILSON FREIGHT COMPANY and
NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Paul A. Smith respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the First Circuit, entered in this proceeding on August 30, 1979.

OPINIONS BELOW

The Administrative Law Judge's decision (which appears at 40a to 62a) was issued on October 6, 1977, and adopted with minor modifications by the National Labor Relations Board on February 10, 1978. 234 NLRB No. 132 (37a to 39a). The Board's petition for enforcement was denied by the United States Court of Appeals for the First Circuit. 604 F.2d 712 (1a to 35a).

JURISDICTION

The Court of Appeals denied the Board's petition for enforcement on August 30, 1979. After the Court of Appeals granted petitioner's motion to intervene on November 15, 1979 (36a), Mr. Justice Brennan entered an order on November 19, 1979, extending petitioner's time to file this petition until January 27, 1980. Accordingly, the Court has jurisdiction to review the Court of Appeals' judgment pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151, *et seq.*) are as follows:

Section 7, 29 U.S.C. § 157

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ..

Section 8(a), 29 U.S.C. § 158(a)

> It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .;
>
> * * *
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

QUESTION PRESENTED

Does this Court's decision in *NLRB v. Magnavox Corp.* permit a union to waive contractually the employment rights of a shop steward who seeks to exercise the statutory right to seek improved working conditions by petitioning the government agencies that protect worker health, safety and other rights?

STATEMENT

A. Facts

Until September 3, 1976, petitioner Paul A. Smith was a full-time employee at the Chelmsford, Massachusetts terminal of respondent Wilson Freight Company (here called "Wilson"). In addition to his responsibilities as a Wilson employee, Smith served as the elected union steward at the terminal. Teamsters Local 25 was the collective bargaining representative (41a - 42a).

In the view of many of the Chelmsford employees, including Smith, Wilson was seriously deficient in living up to the health and safety requirements imposed both by state and federal laws, and by provisions of their collective bargaining agreement, the National Master Freight Agreement (here called "NMFA"), which incorporated those requirements by

reference. For example, Wilson frequently sent out trucks in snowy conditions without tire chains required by law, thereby endangering both the drivers and the public. The loading areas of the terminal were not adequately heated, and dockworkers were not given protective clothing when handling dangerous materials.

The Chelmsford employees also believed that Wilson was abusing various purely contractual rights. Wilson was "dropping trailers" at customers' locations, thus allowing nonunionized employees to load the trailers, work that they believed should have been reserved for Wilson employees. Furthermore, they were aggrieved because Wilson sought to ignore their right to have starting times for workers performing specific duties set in advance and included in the terminal-wide process of selecting jobs according to seniority, known as "bidding".

These difficulties were compounded by the fact that the Local 25 business agent assigned to them, Patrick Lee, was unresponsive to their complaints. On issue after issue, they found that he would not answer their calls for help (47a, Hearing Tr. 46, 95). Only by the most persistent prodding could Smith, as the employees' steward, force Lee to stand up for their rights by filing grievances.

Under Article 7 of the NMFA, neither individual Teamsters members, nor their elected union stewards, are entitled to initiate the formal grievance procedure. Instead, if the matter cannot be resolved informally with the company's supervisors, the workers must persuade a union business agent — an elected officer, working full-time for the union, who is responsible for many

different terminals — that a complaint is of sufficient importance to warrant submitting a grievance to a hierarchy of "joint grievance committees," bodies consisting of three management and three labor representatives that are empowered to settle contract disputes under the NMFA and the various supplemental agreements negotiated on a state or regional basis. (Hearing Tr. 19, 115, 263-264).

Accordingly, after conferring with his constituents, and after concluding that Lee would not act on their behalf, Smith frequently contacted government agencies to protect the Chelmsford employees' rights.[1] Thus, for example, he wrote to the United States Department of Transportation to call attention to Wilson's failure to use tire chains, as required by law. 49 C.F.R. § 393.95(d) (45a). He invoked the protection of the United States Occupational Safety and Health Administration to obtain protective clothing for dockworkers, 29 C.F.R. § 1910.132 (44a), and of the Massachusetts Department of Labor and Industries in seeking adequate heat on the loading docks (48a). Believing that the way in which Wilson was allowing work to be performed by nonunion employees not only deprived union members of work but also violated Interstate Commerce Commission regulations, Smith sought the Commission's intervention in that matter (Hearing Tr. 93, 148-150). And on behalf of a constituent, Swain, who was dissatisfied with a union-sponsored settlement of an unfair labor practice charge, Smith called the NLRB to ascertain the accuracy of, and basis for, the union's statement to Swain that the Board found his charge to be without merit (47a; Hearing Tr. 84-87).

[1]Some of his complaints were successful, leading to remedial action. Others were denied by the agencies concerned.

As may well be understood, on Wilson's little list, Smith was a nuisance who never would be missed. Its stated reason for ridding itself of petitioner arose in connection with the long-standing dispute over bidding practices.

The NMFA requires employers to permit employees to exercise their seniority in bidding for the various kinds of jobs available at each terminal. Because the employees believed that Wilson's refusal to post starting times for certain jobs on the bidding sheet violated their rights, under Smith's leadership, they had for some time declined to exercise their seniority by bidding for any of the jobs (50a). In response, on the bid sheet posted on September 1, 1976, for assignments effective on September 7, 1976 (the day after Labor Day), Wilson stated that any employee who did not exercise his right to bid would simply be assigned (Resp. Exh. 13).

The employees, again under Smith's leadership, persisted in their refusal to bid, and consequently Wilson's manager gave out assignments when the employees reported for work Tuesday morning. Because all employees accepted these assignments, they had effectively sacrificed their seniority advantages (Hearing Tr. 235-236). Nevertheless, Lee finally agreed to file a grievance over the issue, which he had previously refused to do (Hearing Tr. 128).

Wilson seized on these events as an excuse to discipline Smith, allegedly for exceeding his authority as a steward and thereby interrupting his employer's business, in violation of Article 41 of the New England Supplement to the NMFA.[2]

[2]Article 41 provides, in relevant part:

> Job stewards and alternates have no authority to take strike action, cause a slowdown or any other action interrupting the Employer's business except as authorized by official action of the Local Union. The Employer recognizes these limitations upon the authority of job stewards and their alternates, and shall not hold the Union liable for any unauthorized acts. The Employer in so recognizing such limitations shall have the authority to impose proper discipline, including discharge, in the event the job steward has taken unauthorized strike action, or work stoppage in violation of this Agreement.

The full text is set forth as n. 3 of the Court of Appeals' opinion (3a).

Article 47 of the New England Supplement to the NMFA provides that before an employee may be discharged for any reason, except four "cardinal offenses" not relevant here, he must be issued a warning letter (Gen. Coun. Exh. 23). Accordingly, on September 2, 1976, Smith was issued a warning letter, stating that his recourse to government agencies such as OSHA, DOT, ICC and the NLRB, was, in view of his position as steward, a violation of Article 41, and that any further "interference" with Wilson's business would result in his discharge (43a - 44a). The following day, Smith was discharged, and was sent a second letter stating, without specifying any individual violation, that because he had exceeded his authority as steward and interrupted business, he was discharged (44a - 45a).

A grievance over the discharge was denied by the New England Joint Area Committee (here called "NEJAC"). Very little of what happened at the hearing is reflected in the record. The two-sentence decision of the NEJAC panel, quoted in full at 17a n.11, said only that Smith had exceeded his authority as a steward, and that the discharge was therefore valid.

B. Proceedings Below

1. NLRB

On October 20, 1976, Smith filed an unfair labor practice charge, contending that Wilson had violated § 8(a)(1), (3), and (4) of the National Labor Relations Act (hereinafter cited as "Act"), 29 U.S.C. § 158(a)(1), (3), and (4). On January 28, 1977, the General Counsel filed a complaint against Wilson, and on April 28, 1977, a hearing was held before an administrative law judge ("ALJ") on the complaint as amended at the hearing. On October 6, 1977, the ALJ found the discharge to be in violation of § 8(a)(1), (3), and (4) and ordered Wilson to give Smith backpay and to offer to reinstate him. The NLRB subsequently affirmed, with minor modifications, on February 10, 1978.

The Board rejected Wilson's contention that Smith's complaints constituted personal attacks manifesting disloyalty to Smith's employer, and thus concluded that they were not excluded from the Act's protection by the *Jefferson Standard Broadcasting Co.* case, *NLRB v. IBEW Local 1229*, 346 U.S. 646 (1953) (52a - 53a). It also found that Smith had not, in fact, exceeded his authority as shop steward (54a). To the contrary, because Smith wrote to the agencies on behalf of his fellow employees in his unit, he was engaged in concerted activity, protected by § 7 of the Act, 29 U.S.C. § 157 (51a - 52a).

The Board also affirmed the ALJ's analysis of the conflicting testimony about the bidding protest (53a - 55a). It minimized the importance of the incident, because Wilson had lost no business as a result; indeed, no assigned deliveries had been missed or even were delayed. However, it was unnecessary to determine whether Smith could lawfully have been discharged for exceeding his authority by leading the protest, because the Board found that the incident was merely a pretext

for terminating him for filing complaints with government agencies, and otherwise engaging in activities protected by the Act.

2. Court of Appeals

The Court of Appeals for the First Circuit denied the NLRB's petition for enforcement. It rejected the Board's pretext finding because its analysis did not conform to the First Circuit standard (19a). Although the NLRB and most circuits have ruled that a discharge is unlawful if the employee's participation in protected activities was a substantial motivating factor in the decision to discharge, *e.g., NLRB v. Montgomery Ward & Co.*, 554 F.2d 996 (10th Cir. 1977), the First Circuit requires proof that the employee would not have been discharged if he had not engaged in protected activities. *NLRB v. Eastern Smelting and Refining Corp.*, 598 F.2d 666 (1979).

The court then proceeded to outline factors that the Board should have considered when proceeding under this "but-for" standard. It concluded that the Board had erred in disregarding the express finding of the joint committee that Smith had acted in excess of his Article 41 authority. Moreover, despite the terse character of the NEJAC decision, the court decided that various other factual findings were implicit, and concluded that the Board should have deferred to these findings, as well. In spite of the Board's very broad discretion to decide whether to exercise its jurisdiction over a dispute that has also been the subject of arbitration, *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964), the court announced the novel rule that the Board must defer to factual findings of arbitrators (20a).

Having reached these conclusions, the normal course would have been to remand to the Board for determination whether Smith would have been discharged but for

his complaints to government agencies. However, the court decided that a remand was unnecessary, because Smith's communications with the agencies were not protected by the Act (23a).

It recognized that under *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), resort to administrative and legislative forums to improve working conditions is within the scope of the "mutual aid or protection" clause of § 7, which is broader than mere collective bargaining.[3] Nevertheless, the court concluded that the September 2 letter reflected a "perfectly proper business justification" (26a), because the collective bargaining agreement placed limitations on the authority of union stewards which Wilson was simply trying to enforce. Indeed, the court said, it was petitioner Smith, not Wilson, that was unhappy with the union. "Anti-union" motivation, then, could not have caused Wilson's actions (28a).

The court did recognize that, even in the absence of wrongful motivation, conduct inherently destructive of important employee rights may violate the Act. However, it concluded that waiver of the right of union stewards to complain to government agencies to obtain important job protections, instead of using the grievance procedure, was not "'inherently destructive' of the national labor policy." (30a). For this conclusion, the court relied upon *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975), and reasoned that the national labor policy favoring voluntary grievance procedures was advanced, not offended, by Article 41.

[3]Because the court was not certain how the ICC complaint was related to working conditions, it deemed it unprotected (25a n. 17). Apparently, the court did not understand that although the ICC regulates which employers may perform certain work, the effect of its regulations is also to decide which employees do the work. Concerted activity in such a dispute is certainly protected.

Thus, the Court of Appeals has fashioned a new theory of the Act, pursuant to which an employer and a union may, by agreement, jeopardize the employment status of union stewards by insisting that they forgo the right to file protests with government agencies over health and safety, as well as complaints to the Board itself, even when the designated union officials fail to respond. And it did so without mentioning this Court's ruling in *NLRB v. Magnavox Corp.*, 415 U.S. 32 (1974), which plainly prohibits private agreements that abrogate crucial statutory rights.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts with Decisions of This and Other Courts and Creates a Significant Means for Denying Employees Their Statutory Rights.

The Court of Appeals has held that, although employees who file complaints with government agencies seeking improvement of working conditions through enforcement of government regulations are protected by the Act, that protection may, at least for employees who are active in union activities, be waived by their union in collective bargaining. The decision represents such a substantial departure from well established judicial principles, and such an immediate and serious threat to crucial rights of workers which could also hamstring government enforcement programs, that this Court should grant the petition.

Section 7 clearly protects individual employees' rights to seek and hold union office,[4] and to communicate with government agencies about conditions of

[4]*Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954); *NLRB v. Glenn Berry Manufacturers*, 422 F.2d 748 (10th Cir. 1970); *Fruin-Colnon Corp. v. NLRB*, 571 F.2d 1017 (8th Cir. 1976).

employment.[5] Accordingly, the exercise of those rights cannot be a basis for employer discrimination. Wilson's justification for its discharge of Smith rests solely on the proposition that Local 25 effectively waived petitioner Smith's statutory rights when it agreed to Article 41 of the New England Supplement. Although this Court has never expressly decided whether these particular rights may be waived by the union, waiver would be inconsistent with *NLRB v. Magnavox Corp.*, 415 U.S. 322 (1974), a case the Court of Appeals did not even mention in its opinion.

In *Magnavox,* the Court held that, although a union could waive certain § 7 rights in the bargaining process, certain rights such as the right to distribute literature or to solicit union memberships could not be entrusted to that process. Drawing upon the distinction between waivers of the right to strike to protest unfair labor practices and the right to strike for economic gains, recognized in *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270 (1956), the Court concluded that the right to choose a bargaining representative is not one that unions should be permitted to surrender. Moreover, when there is a conflict of interest between the union's desire to maintain the status quo and the employee's possible desire to effectuate a change, "the premise of fair representation" does not support the union's power to negotiate away employee rights. 415 U.S. at 325.

Both these factors militate against the waiver upon which Wilson relies. For it is only through union leaders that a bargaining representative can act. If a union can "waive" the right of employees to hold union office, such as a job steward, and an authorize the employer to discharge any employee whose internal union

[5] *Eastex, Inc. v. NLRB,* 437 U.S. 556, 566 (1978).

activities do not conform to union leaders' wishes,[6] then the employees might as well not have the right to choose a union as their bargaining representative at all. With respect to the second factor, the union leadership's interest in protecting members' right to oppose them for union office certainly diverges from the interest of the members. Thus, the Court of Appeals for the Sixth Circuit has held that *Magnavox* precludes waiver of the right to distribute literature pertaining to candidacy for union office, as well as literature pertaining to selection of bargaining representatives. *General Motors Corp. v. NLRB,* 512 F.2d 447 (1975).[7]

Indeed, the very notion that the union may waive the rights of employees to participate in internal union activities is antagonistic to the established rule that an employer violates the Act when it discharges an employee, because of his union activities, at the behest of the union. Accordingly, such cases as *Rust Engineering Co. v. NLRB,* 445 F.2d 172 (6th Cir. 1971), and *Fruin-Colnon Corp. v. NLRB,* 571 F.2d 1017 (8th Cir. 1978), although not discussing a waiver theory, are also in conflict with the decision below. Moreover, because Local 25's leadership was willing – for whatever reason – to allow the unlawful conditions at the Chelmsford terminal to remain, it was plainly in conflict with Smith and those with whom he was acting concertedly in protesting the illegalities that were directly harming them.

[6] *But see NLRB v. General Motors Corp.*, 373 U.S. 734, 743 (1963) (indicating that the only obligation to a union that may be enforced by discharge is failure to pay dues).

[7] An officer of Wilson testified that the purpose of Article 41 was to absolve the union of possible liability for damages because of unauthorized acts of stewards. Thus the interest of the union, as well as that of the leadership, was opposed to the interest of union stewards with respect to the negotiation of this part of the contract.

Workplace health and safety rules, such as those enforced by the Occupational Safety and Health Administration and the Department of Transportation's Bureau of Motor Carrier Safety, represent social judgments about the bare minimums below which no workplace, unionized or not, should fall. Although in some instances unions may choose to emphasize other issues in their bargaining, the possibility that unions may surrender the employee's right even to complain to the government about employer violations strikes a severe blow against enforcement of crucial safety standards by agencies that must often depend on worker complaints for enforcement.

The decision of the Court of Appeals opens a critical loophole in the § 7 right to resort to government agencies. The singling out of union stewards, generally the more aggressive and articulate employees who are most willing to stand up for workers' rights, is particularly egregious, because they are the most likely source of complaints against violations of health and safety laws. Moreover, if the employer and union can, in order to funnel all complaints through the grievance procedure, contract that employees who hold office as union stewards cannot complain to the government without losing their livelihood, there is no reason why they cannot contract away every employee's right.[8] After

[8]The Court of Appeals emphasized that Smith had identified himself as a shop steward in many of his complaints, and concluded that he was thus acting "in the capacity of shop steward." (27a). Wilson did not discipline Smith in his "official capacity", such as by withdrawing any special privileges he enjoyed by virtue of his union office, or by asking the union to select a different steward who would abide by the contractual limitations. Nor did Local 25 seek to replace Smith as steward, which betokens his strong support smong his constituents, on whose behalf he was acting. It is Wilson's overreaching — punishing Smith *as an employee* — that violated the Act.

all, the grievance procedure preempts the rights of all employees, not just of unions and their agents. *Vaca v. Sipes,* 386 U.S. 171 (1967). Thus, in addition to being in conflict with the decisions of Courts of Appeals of other circuits, the decision below raises an extremely important question of employee rights that warrants consideration on a writ of certiorari.[9]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.[10]

Respectfully submitted,

Paul Alan Levy
Arthur L. Fox II
Alan B. Morrison
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

January 28, 1980 *Attorneys for Petitioner*

[9]Permitting the discharge to stand will also undermine federal laws dealing with many other issues of public importance, including the union democracy provisions of the Landrum-Griffin Act, 29 U.S.C. §§ 401 *et seq.*

[10]If the writ of certiorari is granted, the relief petitioner seeks is a remand to the NLRB to consider whether Smith's leadership of the bidding protest was simply a pretext for his dismissal and, if not, whether that activity was protected. Accordingly, although petitioner believes that the Court of Appeals' discussions of the appropriate pretext standard, of the obligation of the NLRB to defer to implicit factual findings by the joint committee, and of the character of his contacts with the NLRB, were also in error, because the Court of Appeals ultimately did not rely on those grounds, the Court need not consider those issues at this time. Petitioner reserves the right to contest these dicta at a later time, should they become the basis for an unfavorable judgment.

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 78-1178

NATIONAL LABOR RELATIONS BOARD,

PETITIONER,

v.

WILSON FREIGHT COMPANY,

RESPONDENT.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

Andrew F. Tranovich, Attorney, with whom *John S. Irving*, General Counsel, *John E. Higgins, Jr.*, Deputy General Counsel, *Robert E. Allen*, Acting Associate General Counsel, *Elliott Moore*, Deputy Associate General Counsel, *Elinor Hadley Stillman* and *Lee Ann Huntington*, Attorneys, were on brief, for petitioner.

Paul J. Kingston, with whom *Paul V. Mulkern, Jr.*, and *Kingston & Garrett*, were on brief, for respondent.

August 30, 1979

CAMPBELL, *Circuit Judge*. The National Labor Relations Board has applied for enforcement of its order against the Wilson Freight Company. The Board, summarily affirming the decision of its administrative law judge (ALJ),[1] ruled that the Company had violated §§ 8(a)(1), (3), and (4) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3), and (4),[2] by discharging an employee, Paul Smith,

[1] The Board affirmed "the rulings, findings, and conclusions of the [ALJ]," modified his remedy as to the computation of interest on the back-pay award, and adopted a slightly modified version of his recommended order. 234 NLRB No. 132 (Feb. 10, 1978).

[2] These provide as follows:

"Sec. 158(a) It shall be an unfair labor practice for an

for concerted activity protected by the Act, and ordered, *inter alia*, that Smith be reinstated. 234 NLRB No. 132 (Feb. 10, 1978). The Company opposes enforcement on the ground that Smith was discharged for a legitimate business reason.

The Company is a motor freight carrier, one of whose terminals is in Chelmsford, Massachusetts. Drivers there are represented by Local 25 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The discharged employee, Smith, was the shop steward at the Chelmsford terminal. During the several years prior to his discharge on September 3, 1976, Smith registered numerous complaints against his employer with governmental officials and agencies. The Board ruled these complaints were "protected" under the National Labor Relations Act and that they constituted the "real" reason for Smith's discharge. The Company's contention that Smith was discharged for interfering with an internal bidding procedure was treated as a mere pretext. In particular, the Board held that a warning letter, dated September 2, 1976, and mailed to Smith just before he was discharged, demonstrated the Company's anti-union animus. In the letter the Company had said Smith's complaints interfered with its business and were in excess of his authority as shop steward, and that further interference or conduct in excess of authority would result in his instant dismissal.

---

employer—
(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
...
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;
(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this [Act]."

I.

A critical issue, then, is whether Smith's incessant complaints, made outside the bargaining framework, went so far beyond the functions of a shop steward, as defined in Article 41 of the collective bargaining agreement between the Company and Local 25,[3] as to justify the September 2 warning letter. The ALJ's findings say little about the

---

[3] Article 41 of the so-called New England Supplemental Freight Agreement, to which both Local 25 and the Company were parties at relevant times, reads as follows:

"The Employer recognizes the right of the Union to designate job stewards and alternates for each terminal from the Employer's seniority list, but no more than one in each classification. *The authority of job stewards and alternates so designated by the Union shall be limited to, and shall not exceed the following duties and activities*:

"1. The investigation and presentation of grievances to his Employer, or the designated company representative in accordance with the provisions of this collective bargaining agreement;

"2. The collection of dues when authorized by appropriate Local Union official;

"3. The transmission of such messages and information which shall originate with, and are authorized by the Local Union or its officers, provided such messages and information:
(a) have been reduced to writing, or
(b) if not reduced to writing, are of a routine nature and do not involve work stoppages, slow-downs or refusals to handle goods.

"Job stewards and alternates have no authority to take strike action, cause a slowdown or any other action interrupting the Employer's business, except as authorized by official action of the Union. The Employer recognizes these limitations upon the authority of job stewards and their alternates, and shall not hold the Union liable for any unauthorized acts. The *Employer in so recognizing such limitations shall have the authority to impose proper discipline, including discharge, in the event the shop steward has taken unauthorized strike action, or work stoppage in violation of this Agreement*. The Union reserves the right to remove the Shop Steward at any time, for the good of the Union.
"Stewards shall be granted super-seniority, for all purposes including layoff." [Emphasis supplied.]

scope and actual character of Smith's complaints. The ALJ seems to have regarded the complaints as "protected" whether or not Smith was acting beyond the contract limitations imposed on shop stewards. As we see the issue differently, we set out in detail the facts concerning Smith's complaint activity, relying in large part on exhibits consisting of Smith's letters and the responses he received.

Smith began complaining to outside officials in 1974, a short time after the Company had taken over a new terminal in Chelmsford, Massachusetts. The terminal manager was one Rudolph, and after a brief period of good feelings, relations between Smith and Rudolph deteriorated.

In September of 1974, signing himself as "shop steward," Smith dispatched a letter to Massachusetts Governor Sargent, complaining of inadequate heat within the terminal in purported violation of a state regulation, Industrial Bulletin No. 1, § 113. Smith wrote this letter shortly after components of the Teamsters Union and a group of Massachusetts truck owners had negotiated a state-wide agreement, known as the Industry Heat Agreement, indicating how the regulation would be applied to their circumstances. State officials approved this agreement, and it was signed on behalf of Smith's union, Local 25, by Business Agent Fred Singelais (who was also chairman of the union negotiating group). The agreement provided that there should be warm-up rooms in terminals and that employees should receive periodic heat breaks. In his letter to Governor Sargent, Smith did not accuse the Company of failing to comply with the Industry Heat Agreement, the existence of which he acknowledged, but rather complained that the agreement was illegal and improper. Smith felt that the state regulation required the provision of heat throughout the terminal, and that his union had been wrong to agree otherwise.

In his letter, Smith asked the Governor, sarcastically, if "we should pay our State Income Tax to the Teamsters." The letter concluded,

> "Is the State so weak that they cannot enforce the law where Teamsters and Trucking Owners are concerned? We do not believe so, but we have been wrong before.
>
> "We are asking your help to prove us right without involving the Federal Government.
>
> "Respectfully Yours,
> Paul A. Smith
> Shop Steward"

Copies of this letter were sent to Massachusetts Attorney General Quinn and the Massachusetts Safety Commissioner.

The Governor's office responded to Smith on October 2, 1974 that the warm-up room plan, negotiated between the Teamsters Union and the trucking company owners was considered to be "acceptable by both labor and management and sufficient under the law .... If your understanding of the law differs from that of those involved in these negotiations, it might be helpful for you to seek legal advice."

There the matter lay until March of 1975, when Smith, in another letter signed "Paul Smith, Shop Steward," wrote to the new governor, Dukakis, accusing state officials, and in particular Mr. Everett Grady of the Massachusetts Division of Industrial Safety, of either not knowing what they were talking about or else refusing to do their job and being "full of bull." Smith continued,

> "I feel we have been patient enough. We are entitled to an answer. Is Section 113 of Bulletin 1 a law? If so why is it not being enforced?"

This set off a flurry of letters between representatives of the trucking industry's Employers' Group; the Director of the Massachusetts Department of Labor and Industries;

and Mr. Singelais of Local 25. The question was raised why Smith had not filed a grievance with Local 25 as provided under the Industry Heat Agreement.[4] In a second letter to Governor Dukakis, dated April 24, 1975, Smith assured the Governor that "the procedure of making a formal complaint to the Union has already been done," and that he, Smith, had taken the matter up with "Pat Lee, our business agent." However, in a letter on Local 25's stationery, dated July 18, 1975, Business Agent Singelais wrote the owners' group:

> "In regard to the letter . . . pertinent to the letter sent to Governor Dukakis by Paul Smith, the Steward of Wilson Freight Company, relative to the Heat Law and an alleged discussion with Business Agent Patrick Lee, I have discussed this matter with Pat, and he assures me that to date, he has not received a grievance relative to the Heat Law, nor did Mr. Smith have any discussion with Pat about this matter.
>
> "As Co-Chairman of the Heat Committee, I am sure that I do not have to familiarize you with the procedure that has to be followed and until such time as a grievance is filed by Mr. Smith, you may consider this matter closed."

No further correspondence relative to the heat matter appears in the record.[5] We observe that the foregoing com-

[4] Paragraph 7 of the Agreement provided, "Heat grievances should be filed in writing with the Business Agent, dated and signed."

[5] Mr. Everett L. Grady, Director of the State Division of Industrial Safety, the official responsible for enforcement of the heat regulation, in a letter of July 14, 1975, found that the Company had installed "a form of trailer truck sealing devices on their terminal doors and has provided a warming room in accordance with the agreement, but periodically certain employees of this company are filing complaints with this Division demanding heat within the terminal itself which is impractical due to 40 or more doors in the building utilized for truck unloading purposes." Mr. Grady concluded that the Company was in compliance with the agreement between the carriers and the Teamsters Union.

plaint to Governor Dukakis and the alleged demeaning of Mr. Grady were actions later criticized by the Company in its September 2, 1976 letter to Smith. In finding that letter indicative of anti-union animus, the ALJ did not mention that Smith's heat complaints had been directed against policies and procedures spelled out in the Industry Heat Agreement to which Local 25, Smith's union, was a signatory. Nor did the ALJ mention the complete absence of evidence that Smith's conduct was endorsed by Local 25. In crediting Smith's testimony throughout the proceeding, moreover, the ALJ did not comment upon the disparity between Smith's representations in his letter to the Governor that he had complained formally to the Union and had taken up the heat complaint with Business Agent Lee, and the flat contradiction of these representations in Business Agent Singelais' letter.[6]

Smith followed the heat complaint with a plethora of other complaints delivered over Smith's signature as "shop steward," not individually. There is no evidence that any of these complaints were made with the official ap-

[6] Smith conceded in testimony that all, or virtually all, of the complaints which he forwarded directly to various agencies could also have been made the subject of grievances under the contract grievance procedure. Smith justified his failure to grieve matters, and his taking of independent initiatives, on the ground that Business Agent Lee failed to cooperate in processing the grievances suggested by Smith. Smith testified it was the function of the business agent to file complaints for arbitration. The ALJ ruled that because Smith's attempts to press grievances were "futile," Smith was not exceeding his authority as shop steward by taking matters in his own hands. The ALJ's finding of futility was based solely on Smith's testimony; neither Business Agent Lee nor any union official appeared as a witness. Not only does Business Agent Singelais' letter, referred to in the text, suggest another side to the story, there is little or nothing in the record by way of written communications between Smith and Business Agent Lee evidencing efforts by Smith to cause Lee to process a grievance, or taking Lee to task for failing to do so. By contrast, the record is replete with Smith's letters to outsiders and to Company officials registering complaints of all kinds.

proval of Local 25 or its officers. Rather they seem to have been instigated by Smith with, according to his own testimony which the ALJ credited, support from one or more persons at the Chelmsford terminal.

On April 3, 1975, Smith issued a letter headed, "This is a Warning Letter," to Rudolph, the terminal manager, complaining that local freight pick-ups and deliveries, done as a favor to customers, violated regulations of the Interstate Commerce Commission. The letter ended, "Further violations of this type cannot be tolerated." On May 16, 1975, Smith wrote to the Regional Director of the I.C.C., over his title of shop steward, stating that he wished to initiate a complaint against Wilson Freight Company and another named carrier for violating Tariff ECMCA 149J, item 501-10, by spotting trailers without power for as long as two and three days without charge. A copy of this letter was sent to "Floco Consol—Summit Industrial Ctr. Peabody," and another copy to the President of Wilson Freight, in Cincinnati, Ohio, with the comment,

> "Where it is company policy to involve customers in labor disputes, I feel that you would not mind if I involved them to insure that you follow the Interstate Commerce Commission's Regulations."

According to Smith's testimony, the I.C.C. responded that the Company could do what it was doing, as long as it provided equal service to all customers. What connection, if any, existed between employment conditions at the terminal and a complaint of this nature is not explained in the record.

At about the time of the I.C.C. complaint, Smith complained to the Occupational Safety and Health Administration (OSHA) concerning the Company's failure to provide personal protective clothing for drivers in the event chemicals or acids were spilled. An inspection was conducted at the terminal, and as a result the Company was cited for a non-serious violation and fined a small sum.

Soon thereafter, Smith was discharged, allegedly for violating a Company rule concerning the carrying of unauthorized passengers. In response, Smith filed an unfair labor practice charge on May 23, 1975, and also a contract grievance. The latter went to arbitration and was resolved in his favor resulting in his reinstatement, after which the unfair labor practice charge was withdrawn.

On August 25, 1975, Smith wrote to the Company's President in Ohio, signalling his intention henceforth to monitor the Company's compliance with Department of Transportation regulations. The sarcastic flavor of Smith's letter can be derived from the following excerpt:

"Mr. Gantz:

> "Ever since arbitration I have been doing a lot of thinking. All this concern was brought on by just one simple statement by Jack McCarthy. He said, something like, it is the duty of a shop steward to know the D.O.T. rules and regulations and to obey them so as to set a good example for the men he represents.
>
> "Here all the time I thought I had been doing a pretty fair job at trying to obey the laws. Evidently I had not been trying hard enough.
>
> "Now that I am over my hurt feelings I have promised myself not to do just a good job but rather a great job.
>
> "I started to study the D.O.T. regulations again. Although I am making good progress I will now need your help."

Smith then described three areas where the Company was supposedly in default: it should (1) clarify what an unauthorized passenger was; (2) have drivers write up vehicle reports daily on trucks they drive; and (3) provide snow chains. Smith's parting shots were, "I would never want to subject the Company to the feeling that the Union

is not doing everything in their power to uphold the law," and "P.S. If there are any other items that I come across in further review of the rules, I will be happy to let you know, where I now know of your concern."[7]

This letter was followed by a campaign to compel D.O.T. officials to take action against the Company in the areas cited. During much of this period, Smith was a candidate —ultimately unsuccessfully—for the position of union business agent in an election scheduled for the latter part of 1976. Throughout 1975 and much of 1976, D.O.T. officials took the position, in response to Smith, that the Company was exempt from the regulations which Smith said applied. Irritated, Smith wrote Congressmen Early and Drinan to enlist their support. He finally achieved a measure of success when, in the summer of 1976, a D.O.T. official called Rudolph informing him of the snow chains complaint—a call which Rudolph testified, because it came in the summer season, "blew his mind."[8] Other calls from D.O.T. followed. The upshot was that by winter of 1976, the Company had chains available at its terminal.

Also in the summer of 1976, Smith was involved in another incident which annoyed Rudolph. Smith made a telephone call to the local NLRB office sometime after the Board had dismissed an unfair labor practice charge filed on behalf of a co-worker, Swain. Smith testified that at the time he made the call, he knew the Board had found the charge to lack merit and that the Company had agreed to put Swain back to work. Asked why he did not consider the case closed at that stage, Smith said he did not think it proper that an arrangement had been made, sanctioned

[7] In rejecting out of hand the Company's contention that there was malice behind Smith's complaints, the ALJ made no mention of this letter.

[8] Smith testified, reasonably, that unless the Company made plans to procure chains in the summer, they would not have them by winter.

by Union Business Agent Lee, for Swain to return to work without back pay. Smith testified "it's very possible" that he told the Board representative, at this time after the charge had been withdrawn, that "the Company couldn't be trusted in these matters."

This completes a description of Smith's complaints. These were the basis of the Company's September 2, 1976 warning letter; and were held by the Board to be both the real and an improper reason for Smith's discharge. The Company, while asserting that it had every right to object to Smith's complaint activity as it did, denies discharging him for that reason. Instead it says it discharged Smith because of another matter, the so-called bid-voiding episode which occurred the very same week the warning letter was dispatched.

During 1976 there had been a dispute at the Chelmsford terminal between Rudolph and the drivers over the Company's systems for accepting bids on route assignments and times. The ALJ found that "[b]ids are job assignments that are posted and bid by the driver for starting times and jobs, according to seniority. Based on the uncontradicted record evidence, bid sheets are posted several times a year." Beginning in late 1975, the Company indicated that after the effective date of the new bargaining contract, in April 1976, it would make certain changes in bidding practices which it believed the new contract authorized. These were resisted by Smith, who contended that the Company would be violating the maintenance of standards provision in the contract. The evidence is uncontroverted that Smith and Rudolph had disputed this matter on a number of occasions before the bid-voiding incident in September 1976 which preceded Smith's discharge. It is also undisputed that when management posted a sheet in August 1976 upon which the drivers were to indicate their preferences, someone wrote "Do not bid,

illegal'' thereon, resulting in no bidding by the drivers. Smith testified that he had done this, that he had similarly ''voided'' bid sheets ''close to half a dozen times'' previously that year, and that Rudolph knew he had done so. Rudolph denied that any bids had been voided prior to August, and denied knowing that Smith was responsible for the August episode since it occurred when Rudolph was on vacation.

In any event, Rudolph himself posted another bid sheet on September 1, 1976, and it is undisputed that Smith, after a discussion with some of the drivers and outside of Rudolph's presence, wrote ''Void'' across the face of it. It is also undisputed that none of the drivers thereafter filled out the bid form. September 1 was a Wednesday, and a note accompanying the bid sheet indicated that the sheet would be taken down by 12 noon on Friday, September 3. The assignments being bid for were to start the following week which, because of the Labor Day holiday on Monday, September 6, commenced on Tuesday, September 7.

Either late on September 2, or in the morning of September 3, Rudolph, having learned of the voiding of the bids, asked Smith whether he was responsible. Smith admitted he was, but claimed that he had received authority to do so from Lee, the business agent, and McCarthy, president of the Local. A three-way phone conversation then ensued between Lee, Smith, and Rudolph, during which Lee told Smith to have the men bid the jobs and Smith said it was too late because the men were out and it was almost 12. Rudolph insisted that the bids were to come down by noon, in any event.

Later that day Rudolph discharged Smith. According to Smith, whom the ALJ credited, the only explanation Rudolph gave that Friday evening for discharging him

was that he was being discharged under Articles 41 and 47 of the contract.[9]

On the question of whether Smith, as steward, had union authority to mark void on the bid sheet and discourage the men from signing up, Rudolph testified that on Friday, before firing Smith, he had inquired of both Lee and McCarthy and was told that neither had granted Smith authority to void the bids. (The relevance of whether or not they gave authority is that, under Article 41, it is a dischargeable offense for stewards to cause a slowdown or interrupt an employer's business except as authorized by official union action, *see* notes 3, 10.) A Company witness, one Tedesco, testified to overhearing Lee tell Rudolph he never authorized Smith to void the bids. Lee himself was not called as a witness at the Board hearing, but Lee appeared earlier before an arbitration panel which, by unanimous vote of union and employer members, voted to uphold Smith's discharge, and it can only be inferred that his testimony then was not supportive of Smith's claim to have received authorization. Smith himself conceded, in testimony before the Board, that he did not have ''written'' authority to mark void on the bids; he also admitted to having told the arbitration panel that he did not have

---

[9] The ALJ found that it was not until a week after the discharge that Rudolph expressly told Smith he was fired for marking void on the bid sheet. Under any interpretation of the evidence this finding is wrong. Smith himself testified that the bid-voiding reason was given him by Rudolph four days later at a meeting on Tuesday, September 7 — the first working day after his discharge. Rudolph and another company witness testified that when Smith was fired Friday afternoon he was expressly told this was because he had interrupted Company business and had exceeded his authority as steward by voiding the bids. Since Rudolph had first confronted Smith about the bids earlier Friday, and there had been considerable heated discussion about them that morning between Smith, Rudolph and Lee — with Smith's discharge occurring later the same day — it is hard to believe Smith was in the dark concerning the at least ostensible grounds for his discharge. Nothing else untoward occurred Friday.

"specific" authority from the Local's president, McCarthy. Given these concessions and the absence of any credible support for Smith's vague claim of authorization, we think the record would not support a finding that Lee or McCarthy ever authorized Smith to interfere with bidding practices, much less that such authority had been supplied by "official action of the Union" as Article 41 requires in the case of stewards' actions causing a slowdown or interrupting the Employer's business. The ALJ, in fact, made no such finding. He instead side-stepped the issue, stating,

> "I also credit Smith's version *that he apprised Rudolph* he had been given a thority to void bids. Whether the authority was in written or oral form is immaterial." [Emphasis supplied.]

As the question was not what Smith told Rudolph but whether authority was in fact given, this finding resolved nothing, although it gives the misleading impression that Smith may somehow have received the union authorization necessary to validate his action.

Smith's discharge was discussed at a meeting between Smith, Rudolph and Lee on Tuesday, September 7.[10] On

[10] Rudolph had mailed Smith the following discharge letter on September 3, which Smith received the next week:

> "This letter is to advise you that your actions of exceeding your authority as Shop Steward, is in violation of Article 41, whereby you caused an interruption of your employer's business, not authorized by Teamsters Local #25, is cause for instant dismissal.
>
> "This action is taken in accordance with Article 47 of the [collective bargaining agreement]."

Article 41, *see* note 3 *supra*, describes the duties of the job steward, and provides that "[t]he Employer . . . shall have the authority to impose discipline, including discharge, in the event the shop steward has taken unauthorized strike action, or work stoppage in violation of this Agreement."

Artice 47 provides, "The employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of the complaint against such employee to the employee, in writing . . . ."

It was disputed at the hearing whether the warning provision

that day, Smith received in the mail the warning letter which the ALJ thought showed anti-union motivation. Rudolph had written the letter on Thursday, September 2, the day before the confrontation leading to Smith's discharge. We quote the letter in full:

> "Mr. Smith:
>
> As Shop Steward, at the Wilson Freight Company, your actions are controlled by Article 41, of the New England Supplement and the National Master Freight Agreement.
>
> "Your authority specified by contract is not to exceed the provisions of Article 41 and any authority delegated to you in writing by the Teamsters Local 25.
>
> "In the past, letters written and signed by you and personal complaints as Shop Steward, at Wilson Freight Company, have been sent to many Government Agencies, including D.O.T., OSHA and NLRB. Furthermore, you have written to Governor Dukakis, of the Commonwealth of Massachusetts, and demeaned Mr. E. Grady, Director of Labor Industries.
>
> "In none of the above instances did you refer these matters to the grievance machinery, nor were you authorized by the Teamsters Local 25 to represent the Wilson Freight Company personnel in these matters.
>
> "Recently, you called the National Labor Relations Board concerning the discharge of Colin Swain, although Swain's discharge had been filed with and was

in Article 47 limited the Company's right to discharge a steward for violation of the Article 41 work stoppage provision. The Company's industrial relations expert testified it did not. At the arbitration following Smith's discharge, the Company apparently tendered the warning letter of September 2 as evidence, if needed, of an Article 47 warning.

pending disposition before the Joint Area Committee. Swain was represented by Agent Lee, of Teamsters Local 25. Your action exceeds your authority as Shop Steward.

"The Company's position is that you are interfering with its business in excess of your authority as Shop Steward and this conduct amounts to gross harassment and will not be tolerated.

"This letter will serve as a warning that any further interference in the business of the Company or any conduct in excess of your authority as Shop Steward will result in your instant dismissal.

WILSON FREIGHT CO.
F. X. RUDOLPH
Terminal Manager

"cc: Jack McCarthy
Pat Lee—Business Agent—Local #25"

In further support of his conclusion that the bid-voiding episode was only a pretext for Smith's discharge, the ALJ found that the Company did not lose any business as a result, nor make any late deliveries. The ALJ did not, however, mention the Company's undisputed evidence that the runs not bid because of Smith's action were able to be driven on schedule only because the Company went to the extra trouble of contacting drivers individually over the Labor Day weekend to assign runs for the following week.

Smith promptly challenged his discharge both through grievance channels under the collective bargaining agreement and by complaint to the NLRB. At the Union's behest, the grievance went to arbitration in October 1976, the panel consisting of three Union and three Company designees. After a hearing all six arbitrators unanimously denied Smith's challenge to his discharge, holding that "Mr. Smith did in fact exceed his authority as steward,"

and that his discharge did not violate Article 47 of the collective bargaining agreement so as to entitle him to reinstatement.[11] The arbitration proceeding was apparently limited to the question of Smith's authority to void the bid sheet; there is testimony before the Board that the arbitrators refused to hear evidence on the subject of Smith's complaints to government agencies. Their decision thus indicates that Smith's conduct in voiding the bid sheet constituted grounds for discharge under the collective bargaining agreement but does not encompass whether the Company's motivation for firing him was the complaints he had earlier filed. The arbitrators necessarily rejected Smith's claim that the Union, through Business Agent Lee or its president, McCarthy, had granted him authority to void the bids. Had Smith's claim to have received proper authorization been accepted, he would not have exceeded his authority as steward.

II.

While the arbitrators thus upheld the discharge, the ALJ, in the decision which became that of the Board, ruled that the discharge violated §§ 8(a)(1), (3), and (4), *see* note 2, *supra,* being motivated not by the voiding of the bids but by Smith's earlier complaints. The Board held that the complaints were protected concerted activities.[12]

---

[11] There is no transcript of the arbitration hearing. A form containing the arbitration submission and decision was placed in evidence at the Board proceeding. The question submitted is as follows:

"Violation of Article 47. Discharge of Paul Smith. Union requests man be reinstateed and made whole."

The decision reads as follows:

"Based on the evidence presented it is the unanimous decision of the Panel that Mr. Smith did in fact exceed his authority as steward at Wilson Freightways. Therefore, the claim of the Union is denied."

[12] The ALJ termed Smith's complaints "union and protected concerted activity," and seems to have had two theories: (1) inso-

It disposed of the claim that they were beyond a shop steward's authority, accepting Smith's assertion that Business Agent Lee had been recalcitrant in pressing grievances through regular channels. The snow chain complaint and the call to the NLRB, both of which preceded Smith's discharge by only a few months, were cited, particularly, as reasons for the discharge. The Company's September 2 letter was viewed as flagrant evidence of anti-union animus. The reason claimed by the Company and accepted by the unanimous arbitration panel as constituting adequate cause under the contract for Smith's discharge—Smith's voiding of the bids—"was merely the reason given, the pretext, to govern the real reasons for the discharge." 234 NLRB No. 132 at 9 n.4. The ALJ credited Smith in all respects and found Rudolph, whose conduct on the stand he criticized, to have been "vague and inconsistent." The ALJ observed that Rudolph failed to explain, if voiding the bids was so important, why he did not investigate similar conduct which the ALJ believed had occurred earlier that year.

Citing *Filmation Associates*, 227 NLRB 1721 (1977), the Board refused to defer in any way to the arbitration decision, asserting that the arbitration panel's refusal to consider evidence on the subject of Smith's letters to government agencies had denied Smith the opportunity to litigate his unfair labor practice claim fully.

---

far as the complaints related to "safety matters" they were protected; (2) "so long as the employee is acting not only in his own interest, but is attempting to enforce . . . contract provisions in the interest of other employees," this activity is protected. It was not specified to what contract provisions the various complaints referred. The ALJ made no effort to deal with the Company's claim that in making the complaints in the capacity of steward, Smith had been violating Article 41's limitations on a shop steward's powers.

The ALJ also found that Company criticism of Smith for complaining to the NLRB violated the Act.

III.

The ALJ's ruling that "[v]oiding of the bids was merely the reason . . . to cover up the real reasons for discharge," and that the "true" reason was Smith's complaints, follows a "pretext" mode of analysis for which we have criticized the Board when circumstances have demanded a less simplistic approach. *See NLRB* v. *Eastern Smelting and Refining Corp.*, 598 F.2d 666, 669-72 (1st Cir. 1979). The Board dismissed out of hand the Company's tendered "good" reason as not a motivation at all, even though the evidence and the arbitration award both indicate that by inducing his fellows to refuse to bid on job assignments Smith was violating significant contract limitations upon a shop steward's authority, and was engaging in wildcat activity which Article 41 of the contract prohibits. Where the record so plainly reveals the existence of an objective cause for discharge, the Board may not reject it in cavalier fashion. *Id. See, e.g., Florida Steel Corp.* v. *NLRB*, 587 F.2d 735 (5th Cir. 1979). In such cases, a finding against the employer is warranted only if it can be inferred from the evidence that, without the concurrence of some established "bad" reason, the employee would have held on to his job notwithstanding a valid cause for discharge. *Eastern Smelting*, 598 F.2d at 670-71.

In refusing to treat the bid-voiding reason seriously, the Board gave no weight to the arbitrators' finding that Smith's actions constituted grounds for discharge. The Board and ALJ apparently felt that because the arbitration was not conclusive upon the unfair labor practices issues, it was altogether irrelevant. In this they were mistaken. The arbitrators' decision conclusively established that Smith's bid-voiding conduct constituted cause for discharge *under the collective bargaining agreement*.

To be sure, even if the discharge was contractually authorized, it might have been an unfair labor practice. The arbitrators never considered if Smith's complaint activity

improperly influenced his discharge, and they never examined all the issues encompassed by the unfair labor practices proceeding—even assuming, which we do not decide, that the arbitrators' rulings on ultimate unfair labor practices issues could have bound the Board. *Compare The Kansas City Star Co.*, 236 NLRB No. 119, at 4 (June 12, 1978) *with Filmation Associates*, 227 NLRB 1721 (1977). But while the arbitration did not foreclose the unfair labor practice issues, it did indicate that Smith's voiding of bids was misconduct of so serious a nature as to be cause for discharge under the terms of the contract. The arbitration panel flatly rejected the contention made on Smith's behalf that firing Smith had violated the contract requirement that there be "just cause" for discharge. The panel ruled that Smith "did in fact exceed his authority as steward" when he voided the bids. These conclusions, rendered unanimously after an evidentiary hearing before a six-member panel composed equally of Union and Company designees, were matters of factual resolution and contractual interpretation within the peculiar competence of the arbitrators appointed under the grievance procedure. No labor law question, of a type appropriately left to the Board, was involved. We cannot see that Smith had any right to have these matters redecided differently by the ALJ or Board, nor was the Board entitled simply to ignore the findings of the arbitrators insofar as relevant. The Board's own policy is to defer to fair and regular voluntary arbitration proceedings where the decision of the arbitrator is not "repugnant to the purposes and policies of the Act." *The Kansas City Star Co.*, 236 NLRB at 4. *See Spielberg Manufacturing Co.*, 112 NLRB 1080, 1082 (1955).

It follows that the Board exceeded its authority to the extent it redecided in Smith's favor factual matters determined by the arbitrators that were essential to a determination of the contractual rights of Smith, his Union, and

his employer. Notable among these was the ALJ's ambivalent finding, *supra*, that could be read to credit Smith's claim to have received authority from Business Agent Lee and President McCarthy to void the bids. If the ALJ meant to suggest that Smith obtained authority sufficient to comport with Article 41, requiring authorization "by official action of the Union," the arbitrators' finding that Smith had exceeded his authority is plainly conclusive both factually and as a matter of contract interpretation. As previously said, moreover, the record lacks substantial support for Smith's claim of authority.

The arbitration award also undercuts the ALJ's findings minimizing the impact of the bid-voiding on the Company's operations. It is true, as the ALJ found, that the Company did not lose business or suffer any late deliveries. But the ALJ said nothing about evidence that Smith's action forced the Company to go to the trouble of calling up the drivers individually over the weekend to schedule their runs; and by denying reinstatement, the arbitrators indicated that they viewed the conduct as a serious breach. Given the arbitrators' close association with the trucking industry, and their role as interpreters of the contract, the Board could not properly shrug off their conclusions. The very presence of a provision like Article 41 limiting the powers of stewards suggests that unilateral action by stewards and their followers poses a significant source of difficulty in the industry. The arbitration panel obviously felt that it was no small matter for a steward, in disregard of the contract and without authorization from high union officials, to induce drivers at a terminal to refuse their employer's method of assigning work. Given the arbitrators' conclusions, we do not think the Board could properly conclude that Smith's conduct was simply *de minimis*.

The result of the arbitration also undermines the ALJ's theory that because, as he found, Rudolph had quietly endured similar bid-voiding incidents earlier in 1976, the

Company had surrendered any right to object to such conduct on the part of a steward. The same argument was available to Smith, for whatever it was worth, during the arbitration, and, if made, plainly cut no ice with the panel.[13] In determining that there was just cause for discharge, the arbitrators necessarily rejected any notion of condonation or waiver. It is unclear, in any event, how the Company's mere silence for at most six months in the face of similar misconduct would either destroy its right to question Smith's authority at a later time, or demonstrate that the Company acquiesced in his misbehavior.

The Board therefore erred insofar as it treated Smith's bid-voiding conduct as allowed under Article 41 (because of supposed Union authorization) and as too innocuous to constitute valid grounds for discharge under the contract. It should have begun with the premise that the conduct constituted just cause for discharge under the contract. It could then go on to ask whether in spite of the existence of such a sufficient ground for discharge, there was evidence to establish that Smith would nonetheless have been retained as an employee had it not been for the existence of another, improper, motivation in violation of §§ 8(a)(1), (3) or (4) of the Act. The existence of a valid ground for discharge does not always rule out a finding of unfair labor practice. People are not invariably fired for every misstep. Even where the misconduct, as here, was serious, it remains conceivable that the operative cause of discharge was some different "bad" reason. A good deal more is required, however, to support an unfair labor practice finding for wrongful discharge in

[13] In *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 (1st Cir. 1979), we reiterated:

> "[T]he Board may not set up its own business standards and then condemn the employer for not following them."

This is especially so when the substantiality of the business reason has been upheld under the grievance procedure reflecting the agreement both of labor and management.

the presence of an objectively established "good" ground for discharge than where the employer's tendered good reason turns out to be weak or extraneous. *Eastern Smelting*, 598 F.2d at 670. This is doubtless why ALJ's are sometimes tempted to disparage the employer's reason unjustifiably. Here the ALJ and Board succumbed to this easy but self-defeating approach. They should, instead, have accepted the validity of the employer's reason insofar as it went and concentrated on deciding whether that "good" reason was nevertheless insufficient, without the "bad," to have produced the discharge.

IV.

If there were no other reason to disagree with the Board, a court might ordinarily remand to it with directions that it reanalyze the evidence in the manner just indicated. The Board would be directed to decide whether, notwithstanding the presence of a valid reason under the contract to discharge Smith, he would have been retained "but for" the bad one, i.e., his making of supposedly protected complaints. That procedure, however, is inappropriate here. Even had we not passed that point of indulgence, *see Eastern Smelting*, 598 F.2d at 671-72, we do not agree that Smith's complaint activity was exempt from his employer's criticism or that the company's response thereto in its September 2 letter was improper. The complaints, and the manner of their making, raised a serious question of Smith's contract authority as steward—a question which the company was not obliged to ignore. In short, even if irritation occasioned by the complaints was a key factor in the company's decision to remove Smith after the bid-voiding episode, rather than to apply a lesser sanction, this fact would not provide a basis for an unfair labor practice finding. We view the case, ultimately, not as one of mixed motive, but as one where the Board has failed to show that either of the purported reasons for discharge was improper. Accordingly, we reverse.

Under § 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of § 7 rights. *See* note 2, *supra*. Reading the September 2, 1976 warning letter as threatening retaliation for Smith's complaints about "safety matters and other matters encompassed in the collective bargaining agreement," the Board proceeded on the assumption that complaints of this nature were rights protected by § 7.[14] As the ALJ credited Smith's assertion that the complaints were made in the interest of others in the bargaining unit as well as of Smith himself, they were found to be "union and protected concerted activity." The employer's September 2, 1976 letter criticizing Smith for these actions, and threatening discharge if he continued, was viewed as unlawful interference with these protected activities and thus as direct evidence of "anti-union animus." As the Board saw it, all or most of the Company's irritation at Smith was rooted in its supposedly illegal objection to his protected conduct.

The Board's conclusion that Smith's complaints were protected under the Act is not without initial plausibility. An employee's § 7 right to engage in concerted activities for "mutual aid and protection" has been held to go beyond affording protection for the narrower purposes of "self-organization" and "collective bargaining."[15] Section 7 protects,

---

[14] Section 7 reads as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

[15] In support of the § 8(a)(3) finding, the Board comes up with little by way of apt authority, citing to *Cameron Iron Works, Inc.*

> "employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and [allows] . . . employees' appeals to legislators to protect their interests as employees . . . ." [Footnote with citations omitted.]

Eastex, Incorporated, Petitioner v. *NLRB*, 437 U.S. 556, 566 (1978). *See Alleluia Cushion Co.*, 221 NLRB 999, 1000 (1975) (employee's OSHA complaint is concerted, protected activity).[16]

But while a letter attacking an employee for resorting to administrative forums and legislators might ordinarily be evidence of an anti-union "bad" motivation, *i.e.*, a motivation to subvert § 7 rights in violation of § 8(a)(1),[17]

---

v. *NLRB*, 464 F.2d 609 (5th Cir. 1972). The Board seems to argue that since Union supervisors, such as Lee, would not join in Smith's complaints, Smith's initiatives became de facto union activity within the protection of § 8(a)(3).

The Board supports the § 8(a)(4) finding on two bases described later in our discussion of that issue.

[16] The Board also calls attention to authorities treating as protected activity under § 7 self-help efforts by individual employees to enforce their own reasonable understanding of the terms of a collective bargaining agreement. *See, e.g., NLRB* v. *John Langenbacher Co.*, 398 F.2d 459 (2d Cir. 1968); *B&M Excavating, Inc.*, 155 NLRB 1152, 1154 (1965), *enforced*, 368 F.2d 624 (9th Cir. 1966). We do not find these authorities particularly relevant here since the ALJ's opinion does not indicate what contract provision, if any, Smith may have been enforcing nor whether the actions he took were reasonable. Moreover, these cases did not involve an employee acting beyond the authority which the contract accorded him. *See infra*.

[17] This is not to say that all manner of complaints to agencies and legislators are automatically protected. Several of Smith's complaints would seem undeserving of § 7 protection in any event. The heat complaint and the gratuitous complaint to the NLRB after Swain returned to work, were in opposition to positions taken by the Union itself. Being contrary to the principle of exclusive representation, such conduct would not seem entitled to the protection of § 7. *See Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975).

Smith's ICC complaint, being unrelated to the improvement of working conditions, *see Eastex, supra*, was also unprotected.

the present letter seems to us to reflect a perfectly proper business justification. Article 41 of the collective bargaining agreement between Smith's union and the Company places limitations upon the authority of stewards, and the Company could properly insist that so long as Smith held the duties and privileges of office, he observe those limitations. This is precisely what the September 2 letter attempts to do. We do not read *Eastex* as forbidding the parties to a collective bargaining agreement from adopting provisions narrowing the delegated powers of subordinate union officials, nor as preventing the employer from seeking to enforce such a provision by confining a steward's formal actions to specified channels.

Unlike the situation in *Alleluia Cushion* and similar cases, the Company's objection was not simply that an employee had gone to OSHA, DOT or elsewhere, but rather that a union steward was acting in defiance of contract limitations upon his powers. The September 2 letter begins with the statement that as shop steward of Wilson Freight, "your actions are controlled by Article 41, of the New England Supplement and the National Master Freight Agreement." It proceeds, "Your authority specified by contract is not to exceed the provisions of Article 41 and any authority delegated to you in writing by the Teamsters Local 25." It thereafter lists Smith's various complaints, emphasizing that they were written and signed by him as Shop Steward.

The letter continued,

> "In none of the incidents did you refer these matters to the grievance machinery, nor were you authorized

Indeed, to the extent Smith may have circulated this to one of his employer's customers, it raised questions of disloyalty and malice which, however, we need not consider. *See NLRB* v. *Local 1229, IBEW* (*Jefferson Standard Broadcasting Co.*), 346 U.S. 464 (1953). This complaint was not specifically mentioned in the September 2 letter although it apparently was encompassed by the reference to "letters written and signed by you and personal complaints as Shop Steward . . . to many Government Agencies."

> by the Teamsters Local 25 to represent the Wilson Freight personnel in these matters."

The Company warns towards the end of its letter that Smith is "interfering with its business in excess of your authority as Shop Steward and this conduct amounts to gross harassment and will not be tolerated." Copies of the letter were noted as being sent to "Jack McCarthy," the union president, and "Pat Lee—Business Agent—Local #25."

The thrust of the letter was therefore that Smith was in violation of the contract—a reasonable enough charge in the circumstances. Article 41 states that the authority of stewards "shall be limited to, and shall not exceed," certain specified duties and activities, including the investigation and presentation of grievances to the employer, or the designated company representative in accordance with the provisions of the contract. Smith's exclusive reliance upon outside complaints, which he expressed in virtually every instance in the capacity of shop steward, not privately, went well beyond the procedures described in Article 41.[18]

Since the Company's criticism of Smith was founded on a reasonable claim of contract violation, the Board erred in concluding that the September 2 letter evidenced anti-union motivation. The record, indeed, is devoid of circum-

[18] To be sure, neither we nor the Board have plenary authority to construe collective baragining contracts. *See NLRB* v. *Strong*, 393 U.S. 357, 360 (1969). However, in an unfair labor practices proceeding the Board and courts may assess the terms of the contract for purposes of determining whether the Company acted reasonably and in good faith. *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 437-38 (1967) (incidental interpretation of contract permissible to decide an unfair labor practices case); *see NLRB* v. *Strong*, 393 U.S. 357 (1969); *NLRB* v. *Great Dane Trailers*, 388 U.S. 26, 37 (1967) (Harlan, J., dissenting). Our reading here indicates that the Company's claims against Smith were non-frivolous and had a reasonable basis in the terms of the contract. As the September 2 letter reflected a business basis for criticizing Smith it was not probative of anti-union bias.

stances evidencing anti-union bias. Smith's own testimony was as critical of the Union and of his superior, Lee, as of his employer; there is no evidence that the Company was unhappy with the Union as such, nor that it sought to trample upon the § 7 rights of individual employees. The evidence rather reflects strong personal differences between Smith, as Union steward, and the terminal manager, culminating in a supportable contention by the employer that Smith was acting beyond his contract authority.

The absence of evidence of improper motivation would normally be fatal to the § 8(a)(1) and § 8 (a)(3) claims. *See NLRB* v. *Great Dane Trailers,* 388 U.S. 26, 33 (1967); *NLRB* v. *Borden, Inc.,* No. 78-1320, Slip op. at 11-15 (1st Cir., June 22, 1979). Wrongful motivation need not be demonstrated, however, when conduct is "inherently destructive" of important employee rights. We shall therefore consider whether Article 41 itself or the Company's attempt to enforce it against Smith amount to conduct destructive of important rights.

Article 41 is aimed at limiting the ability of stewards located at separate installations to gather into their own hands personal authority outside the Union's chain of command and its grievance procedures. Just as a bank may limit the power of officers to sign checks in excess of a certain sum, unions and employers may agree to confine the powers of the subordinate union officials in the interest of orderly collective bargaining. Article 41 leaves to the employer the disciplining of stewards who engage in interruptions of business violative of the agreement. Whether Smith's complaints, individually or collectively, were sufficient to warrant the threat of discharge contained in the September 2 letter would be a matter that could be determined under the grievance mechanism. The Company sent copies of its letter to Union officials, indicating that it was prepared to defend its positions through the normal channels.

We see nothing contrary to sound collective bargaining principles in a provision such as Article 41. An individual employee's normal right, derived from § 7, to complain to officials and legislators does not prevent the parties to a collective bargaining relationship from placing limits upon the powers of particular union officials in order to lessen the danger of wildcat strikes and work stoppages and smooth the process of collective bargaining. While the extent to which Smith's complaints actually interfered with the Company's work may be debatable, Smith's ability to secure the attention of public officials and fellow employees was enhanced by his office as steward—an office which, under the contract, provided him with super-seniority for all purposes including layoff. His office could cause administrators and legislators to believe that he was speaking for the Union, thus giving Smith power greater than the ordinary employee to bring pressures to bear upon the Company, and increasing the risk of multiple demands upon the employer from competing sources.

In *Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. at 62, the Court approved the policy of "fostering collective bargaining" through majority rule. It refused to permit minority employees to bargain directly with the employer thereby diluting the strength of the bargaining agent, and subjecting the employer to competing demands. It quoted as follows from *Steelworkers* v. *Warrior & Gulf Co.,* 363 U.S. 574, 581 (1960):

> "The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." 420 U.S. at 67 n.19.

The *Emporium* Court went on to quote as follows from *NLRB* v. *Allis-Chalmers Manufacturing Co.,* 388 U.S. 175, 180 (1967):

"National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. 'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . .' *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, 202. Thus only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term . . . ." 420 U.S. at 63-64.

In light of the foregoing, we see nothing "inherently destructive" of the national labor policy in a provision such as Article 41 requiring stewards to act through established channels rather than unilaterally. While such a provision may result in a steward's surrendering prerogatives he would have as an individual employee, it assures a more efficient pooling of employee strength and avoids both divisive disputes within the Union and the problem the employer would face were each terminal an isolated fiefdom. By the same token, it is not destructive of employee rights for an employer to criticize a steward, who in its reasonable judgment, is acting in violation of such a provision. To muzzle the employer, as the Board would do here, is to prevent him from attempting to police a lawful provision intended to prevent individual stewards from overstepping the bounds of their office.[19]

The present record is without evidence, other than Smith's own assertions, of efforts on his part to utilize the grievance machinery as Article 41 contemplates. No union official testified beside Smith, and Smith, an unsuccessful candidate for Business Agent, was hardly disinterested. Nonetheless, without hearing from Business Agent Lee or the Local's president, McCarthy, the ALJ unhesitatingly accepted Smith's testimony that Lee was derelict in failing to process grievances. There is no credible evidence from which such a judgment could be made. It is possible that Lee was derelict, but it is equally possible either that Smith did not seriously seek to use the grievance machinery (see Business Agent Singelais' denial of Smith's claimed filing of heat grievances, note 6, *supra*) or else that the matters he presented did not, for good reason, impress higher Union officials as meritorious. Business Agent Lee was not required to process every grievance. If a grievance seemed inappropriate, he could, in good faith, refuse to present it. *See generally Vaca* v. *Sipes*, 386 U.S. 171 (1967). As the Court has recently said in *International Brotherhood of Electrical Workers* v. *Foust*, 47 U.S.L.W. 4600, 4602 (May 29, 1979):

"Union supervision of employee complaints promotes settlements, avoids processing of frivolous claims, and strengthens the employer's confidence in the union. . . . Without these screening and settlement

---

[19] Article 41 contains a sentence exculpating the Union for liability to the Employer for unauthorized acts of stewards, and provides that the Employer "in so recognizing such limitations shall have the authority to impose proper discipline . . . ." If it is an unfair labor practice for the employer to attempt to police Article 41 by imposing discipline, the Article will likely prove unenforceable in view of the Union's disclaimer of responsibility for enforcement.

procedures, the Court found that the costs of private dispute resolution would ultimately render the system impracticable . . . ."

We can find no basis in law for the Board's ruling that Smith, as steward, was absolved from acting within the scope of his authority simply because of his assertion of dissatisfaction with Lee's performance. If the ALJ had in mind that the Union was failing in its duty of fair representation, this serious charge should have been developed at a hearing at which Union officials could testify and respond to Smith's charges. *Vaca* v. *Sipes, supra.* Reasonable minds would not be content to rest such a finding on the testimony of a single, highly interested witness when many other knowledgeable witnesses were available but never called.

We therefore reject the Board's finding that the September 2 letter was indicative of anti-union or any other improper motivation, nor do we find it or Article 41 inherently destructive of employee rights. As remaining evidence was insufficient to establish a § 8(a)(1) violation, we reverse the Board's finding thereof.

V.

As already indicated, *see* note 15, *supra,* there is no support for the finding of a § 8(a)(3) violation. There is not a shred of evidence that Smith was discharged in order to encourage or discourage membership in any labor organization. The Company appears to have normal working relations with Local 25, Smith's Union; its problem with Smith centered around its belief that Smith in the capacity of steward was acting beyond contract authority—a claim unanimously sustained, insofar as the bid-voiding issue was concerned, by an arbitration panel composed in part of Union representatives. Board counsel's argument in favor of the § 8(a)(3) finding is farfetched: because Lee would not press Smith's grievances, he argues, "Smith,

as shop steward, was forced to pursue the complaints himself" in order to represent the unit employees, and his discharge "for carrying out this union related activity" supposedly violated § 8(a)(3). This argument stands on its head the doctrine expounded by the Supreme Court in *Vaca* v. *Sipes* and *IBEW* v. *Foust, supra.* Instead of being bound by proper union determinations of what matters may be grieved, a steward is accorded a presumptive de facto right to speak for the union upon a showing, without more, that he was turned down by a union superior! Independent ventures, undertaken in defiance of superior union authority, become union-related activity. It is not surprising that the Board presents no relevant authority for this theory. We regret that Board counsel are reduced to arguments of this type, just as we regret that a case of this complexity was decided by the Board—supposedly expert in this area—on a summary affirmance of an ALJ's decision which left much to be desired both factually and in terms of sensitivity to the difficult legal issues.

VI.

There is finally the question of a § 8(a)(4) violation. The Board advances two theories. The first is that the objection in the Company's September 2 letter to Smith's letters and complaints to "many Government Agencies, including D.O.T., OSHA and NLRB" refers to Smith's own unfair labor practice charge filed May 23, 1975, which he later withdrew after achieving a successful result in arbitration. The second theory is that Smith's telephone call to the Board, after the Swain matter was resolved in a manner not to his liking, was a protected communication.

We do not think there is substantial support for the first interpretation of the Company's letter. The paragraph immediately following the paragraph to which the Board objects reads, "In none of these instances did you refer these matters to the grievance machinery . . ." Since

Smith's earlier discharge, which was the subject of his unfair labor practice complaint, was grieved, it would seem clear that this was not the subject of the Company's objection. We agree with the Company that the September 2 letter was referring to the Colin Swain incident—not to this fifteen month old complaint of which there is not the slightest evidence the Company ever made an issue.[20]

We also find lacking in merit the Board's argument that § 8(a)(4) was violated by the Company's criticism of Smith for his role in the Swain incident. We agree with the Company that the evidence indicates that Smith called the Board after the unfair labor practice charge was withdrawn essentially to vent his spleen on account of the nature of the settlement. The settlement had been approved by the Union as well as the Company, and Smith's action did not involve providing information in respect to a future or pending proceeding, *compare NLRB* v. *Scrivener*, 405 U.S. 117 (1971), but was merely an expression derogatory of his employer resulting from annoyance with both the employer and the Union officials who had endorsed the settlement. Perhaps even in this posture Smith's right to communicate with the Board would be protected if it had appeared that he was providing information to the Board which served some purpose under the Act, but the principal reason for the call seems to have been to grumble after the fact that the Company "couldn't be trusted in these matters." As has been discussed, Smith, in his role of steward, was bound by the collective bargaining agreement. As a union steward, he had no right, in that capacity, to take unilateral actions designed to undercut the de-

[20] It would, to say the least, be a blunder of the first magnitude for a Company, in a letter drafted by counsel for circulation to the Union, to take a Union steward to task for filing an unfair labor practice charge on his own behalf in a situation later resolved in his favor. To conclude that this was what the Company intended would be to assume that it and its counsel were totally incompetent.

cisions of his Union superiors. If after such a settlement as was made here between the employer and Union resulting in reinstatement of Swain and withdrawal of his unfair labor practice charge, a subordinate Union official like Smith could jeopardize the settlement because of his personal disapproval, the Union's credibility with the employer might be seriously undermined and its bargaining position in future matters weakened. *See generally Emporium Capwell Co., supra.* Even assuming *arguendo* that an ordinary employee, acting in a personal capacity, would be protected in a communication of this type with the Board, the Company can surely insist that Union stewards act in accordance with contract limitations upon their authority in order to promote orderly bargaining.

We therefore reject the finding of a § 8(a)(4) violation.

VII.

We accordingly hold that the September 2 letter was neither in itself violative of the Act, nor was it evidence of improper action under § 8(a)(1) or the other cited sections of the Act. We further hold that the record as a whole is lacking in substantial evidence to support the findings that Smith was discharged for an improper "bad" reason. We reverse the Board's findings that Smith's discharge was illegal and decline to enforce its orders relative thereto.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 78-1178

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

WILSON FREIGHT COMPANY,
Respondent.

ORDER OF COURT
Entered November 15, 1979

Upon motion,

Leave is hereby granted Paul A. Smith to intervene in order to file a petition for writ of certiorari.

By the Court:
/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Tranovich, Kingston and Levy.]

APPENDIX C

234 NLRB No. 132 **D-3448 Chelmsford, Mass.**

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WILSON FREIGHT COMPANY

and Case 1 – CA – 12355

PAUL A. SMITH, an Individual

DECISION AND ORDER

On October 6, 1977, Administrative Law Judge Bruce C. Nasdor issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, to modify his

remedy,[1] and to adopt his recommended Order, as modified.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Wilson Freight Company, Chelmsford, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(c):

"(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act."

[1]The Administrative Law Judge in citing *Florida Steel Corporation*, 231 NLRB No. 117 (1977), inadvertently specified interest to be paid at 7 percent; however, interest will be calculated according to the "adjusted prime rate" used by the U.S. Internal Revenue Service for interest on tax payments. See *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), for rationale on interest payments.

[2]The Administrative Law Judge, in finding an 8(a)(3) and (1) violation, failed to use the broad injunctive language required for such a finding. We shall, therefore, modify his recommended Order and notice accordingly.

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. February 10, 1978.

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Betty Southard Murphy, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

JD-711-77
Chelmsford, MA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

WILSON FREIGHT COMPANY

and Case No. 1-CA-12355

PAUL A. SMITH, An Individual

Ronald S. Cohen, Esq., and
Ronald A. Marrow, Esq.,
of Boston, MA, for the
General Counsel.

Paul J. Kingston, Esq.,
of Boston, MA, for the
Respondent.

DECISION

Statement of the Case

BRUCE C. NASDOR, Administrative Law Judge: This proceeding under Section 10(b) of the National Labor Relations Act, as amended, was heard pursuant to due notice on April 28, 1977, at Boston, Massachusetts.

The charge in this proceeding was filed by Paul A. Smith, hereinafter referred to as Smith, on October 20, 1976, and the complaint in this matter issued on January 28, 1977. The issue to be resolved is whether

the Respondent discharged Smith in violation of Section 8(a)(1) and (3) of the Act because he engaged in union and other protected concerted activities, or because he engaged in activities coming within the purview of Section 8(a)(4) of the Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, is engaged at its Chelmsford, Massachusetts terminal, in the transportation of freight and related products. Respondent, in the course and conduct of its business, at all times material herein, has caused large quantities of goods used by it in the operation of its freight transportation business to be purchased and transported in interstate commerce from and through various states of the United States, other than the Commonwealth of Massachusetts. It annually receives revenue in excess of $50,000 directly from interstate business or from services to interstate shippers or carriers. It is admitted in the pleadings, and I find, that the Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

It is admitted, and I find, that the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 25 (hereinafter referred to as the Union), is and has been at all

times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

Smith, the Charging Party herein, was employed by the Respondent from May, 1967, until September 3, 1976. From approximately 1973, until September 3, 1976, he worked as a tractor-trailer driver at the Respondent's Chelmsford, Massachusetts location. Smith held the position of shop steward during the last 4 years of his employment with the Respondent.

On September 4, 1976, Smith received a copy of a warning letter from Respondent dated September 2, 1976, as set forth below:

> As Shop Steward, at the Wilson Freight Company, your actions are controlled by Article 41, of the New England Supplement and the National Master Freight Agreement.
>
> Your authority specified by contract is not to exceed the provisions of Article 41, and any authority delegated to you in writing by the Teamsters Local 25.
>
> In the past, letters written and signed by you and personal complaints as Shop Steward, at Wilson Freight Company, have been sent to many Government Agencies, including D.O.T., OSHA and NLRB. Furthermore, you have written to Governor Dukakis, of the Commonwealth of Massachusetts, and demeaned Mr. E. Grady, Director of Labor Industries.
>
> In none of the above instances did you refer these matters to the grievance machinery, nor

> were you authorized by Teamsters Local 25 to represent the Wilson Freight Company personnel in these matters.
>
> Recently, you called the National Labor Relations Board concerning the discharge of Colin Swain, although Swain's discharge had been filed with and was pending disposition before the Joint Area Committee. Swain was represented by Agent Lee, of Teamsters Local 25. Your action exceeds your authority as Shop Steward.
>
> The Company's position is that you are interfering with its business in excess of your authority as Shop Steward and this conduct amounts to gross harrassment and will not be tolerated.
>
> This letter will serve as a warning that any further interference in the business of the Company or any conduct in excess of your authority as Shop Steward will result in your instant dismissal.

On September 7, 1976, Smith received, by certified mail, the signed original of the warning letter set forth above. This warning letter was signed by F. X. Rudolph, terminal manager.

On September 9, 1976, Smith received a letter of discharge dated September 3, 1976, as set forth below:

> This letter is to advise you that your actions of exceeding your authority as Shop Steward, is in violation of Article 41, whereby you caused an interruption in your employer's business, not authorized by Teamsters Local #25, is cause for instant dismissal.

This action is taken in accordance with Article 47 of the National Master Freight Agreement and the New England Supplement Freight Agreement.

All monies due to you are enclosed.

Smith filed a grievance which was heard by an arbitration panel to determine if Respondent had violated Article 47 of the Contract by discharging Smith. On October 21, 1976, the panel rendered a decision upholding Smith's discharge. The following is a summary of the letters written by Smith and other relevant activities engaged in by him over the course of 2 years proceeding his discharge. The bulk of this evidence has been gleaned from documents and exhibits introduced by the General Counsel and from Smith's testimony. Where there is a conflict or where Respondent's witnesses have refuted any aspects of this evidence, it will be pointed out.

On May 23, 1975, Smith filed an unfair labor practice charge with the Board's Boston Regional Office alleging that he had been discharged by Respondent because of union, protected and concerted activity. He also filed a grievance which went to an arbitration panel. The panel rendered a decision wherein it recommended that Smith be reinstated with backpay, and as a result the unfair labor practice charge was ultimately withdrawn.

On May 13, 1975, Smith filed a formal complaint with the U.S. Department of Labor Occupational Safety and Health Administration, hereinafter referred to as OSHA, concerning, *inter alia*, Respondent's failure to provide personal protective clothing for the handling of acids and chemicals. As a result of this formal complaint, Respondent received a citation from OSHA.[1] Smith testified that he had several discussions with Pat Lee, the Union business agent, and Company representatives regarding the issue of protective clothing, but Lee took no action, and the Respondent did not furnish same. He further testified that the reason he wrote to OSHA was that he believed protective clothing was required by contract and by law.

On September 17, 1975, Smith wrote a letter to Dave Gantz, President of Respondent, regarding the issue of protective clothing. A carbon copy of this letter was sent to Pat Lee of the Union.

On August 25, 1975, Smith wrote a letter to Dave Gantz complaining about the condition of Respondent's vehicles and the failure of the Respondent to file reports as required by Department of Transportation (hereinafter referred to as DOT) regulations. Smith also requested tire chains for the vehicles at the Respondent's terminal, noting that although it was August and obviously there would be no snow at this time of year, he was making the request early so that the Company might have time to purchase the chains. A copy of this letter was sent to the Union.

As a result of Smith's efforts, Respondent did provide tire chains for its vehicles during the winter months.

On November 13, 1975, Smith called on the Office of Motor Carriers Safety in Boston, Massachusetts, concerning the three issues he had raised in his letter to Gantz, i.e., unauthorized passengers, vehicle condition reports,

[1] Rudolph testified that a small fine may also have been levied against Respondent.

and tire chains. In response he received a letter from DOT, Bureau of Motor Carriers Safety, dated December 29, 1975, wherein it stated that "the matter has been thoroughly investigated and it is believed that the action taken will result in prompt correction."

On January 30, 1976, Smith again wrote to the DOT concerning the same three issues. He received a response dated February 12, 1976, stating that they were forwarding his correspondence to the Regional Office in Homewood, Illinois, requesting that they conduct an investigation for possible violations of the Federal Motor Carriers Safety regulations.

On April 2, 1976, Smith wrote a letter to Donald Trull, Regional Administrator for the Bureau of Motor Vehicle Safety. This letter was in response to a letter Trull had sent to Congressman Joseph D. Early, concerning Smith's complaints to the DOT. Trull's letter suggests that the Respondent may be exempt from certain DOT regulations due to commercial zone exemptions. Smith's letter to Trull contains a postscript, "I have given copies of your letter to the other city drivers at our terminal. It should prove very interesting the next time they are stopped for a DOT safety check and shown your letter of exemption."

Smith received a letter dated June 8, 1976, from A.R. McAndrew, chief compliance division DOT Bureau of Motor Carrier Safety. This letter stated that there had been an error in the interpretation of the DOT rules and regulations by Trull, and that an investigator would determine if Respondent had been misinterpreting certain DOT rules and regulations.

Rudolph testified that he was contacted by DOT several times in July and August, 1976, concerning the

tire chains. Rudolph stated that one of the reasons for the warning letter to Smith was that hearing about tire chains in July and August, "that blew my mind."

At the hearing, counsel for the General Counsel moved to amend the complaint with respect to paragraph 10(b) as follows: That he filed a charge in Case No. 1-CA-10745 with the National Labor Relations Board or contacted the National Labor Relations Board concerning the investigation of the charge filed by another employee in Case No. 1-CA-12018. Hearing no objection from Respondent, the motion was granted. The evidence in this regard reveals that a unit employee, Colon Swain, filed an unfair labor practice charge with the Regional Office on July 16, 1976. Apparently, the Board found no merit to Swain's charge, and as a result, Swain withdrew the charge on August 9, 1976. Sometime thereafter, Smith called the Regional Office identifying himself as Paul Smith, Shop Steward for the Respondent, in an effort to find out why the case had no merit. This incident, according to Rudolph's testimony on direct examination, was another reason which prompted Rudolph to write the warning letter to Smith. In Rudolph's words, "the Colon Swain incident was something that just aggravated the hell out of me."

It is uncontroverted that Smith discussed the various issues raised in his letters to the DOT with Pat Lee, other employees and Rudolph. According to Smith's testimony, Pat Lee never took care of the problems and when Smith made followup calls to Lee, they were rarely if ever, returned. Smith testified that he took the various measures, as set forth above, because of the derelictions on the part of Lee. Furthermore, he testified that there was a general feeling of dissatisfaction among the employees and Smith had the employees

sign a petition to remove Lee as business agent. He filed the petition with William McCarthy, President of the local, but apparently no action was taken. Smith, himself, campaigned for the position of business agent but was unsuccessful.

As early as October, 1974, Smith wrote letters to Governor Dukakis and Sargent concerning the lack of heat for dockmen at the Chelmsford facility. Record testimony revealed that Smith brought this complaint to the attention of Respondent and discussed the problem with fellow employees.

Voiding Bids

Testimony by Smith and Rudolph reflect that there had been a continuing for at least 5 months with respect to bidding[2] practices. The Respondent was seeking to eliminate bidding of under 25 miles and posting the starting times for road drivers. According to testimony by Respondent witnesses, the bidding practice was a factor contributing to the loss of money at this terminal.

On several occasions, Rudolph met with Lee and Smith to discuss issues regarding the bidding procedure. The Union took the position that the manner in which Rudolph was posting the bids was in violation of the contract and maintenance of standards.

On September 1, 1976, Rudolph posted a bid sheet outside of the dispatchers office. Smith saw that the bid sheet was posted in the manner unacceptable to him and the Union, so he proceeded to discuss the situation with

[2]Bids are job assignments that are posted and bid by the driver for starting times and jobs, according to seniority. Based on the uncontradicted record evidence, bid sheets are posted several times a year.

the other drivers. He asked them what they wanted to do and they responded that they did not want to bid. According to Smith's testimony, he, Rudolph, and quite a few of the drivers had a heated argument about whether the sheet, as posted, should be bid. The employees did not want to bid and thus Smith wrote "void" on the bid sheet. Smith took this action when Rudolph stepped inside the dispatch office. Prior thereto, at approximately 10:00 that morning, Pat Lee of the Union attempted to meet with Rudolph to discuss the bidding procedure. Rudolph was busy dispatching and Lee stated that he would return at 5 p.m. Lee never returned to the Company at 5 p.m.

On September 3, at approximately 11:30 a.m., Rudolph inquired of Smith as to whether he had voided the bid and Smith responded affirmatively. Rudolph asked Smith whether or not he had authority to void the bid and Smith responded that he had authority from Lee and McCarthy, President of the local. Thereafter, a three-way telephone conversation ensued between Lee, Rudolph and Smith. Lee told Smith to bid the jobs and they would take the case to arbitration. Smith responded that there was no way the men could bid the jobs at that time because there was a notice posted with the bid sheet that the bids had to be bid by 12:00 noon. At that time it was 11:45 a.m. Smith told Lee that the citymen were all out on the street and the nightmen had gone home, so there was no way that these employees could be contacted in 15 minutes to bid. Smith also stated that in the past the bids were posted until 5 p.m. Rudolph stated that, "if the bid sheet isn't signed by 12 noon it was coming down." Lee responded again that they would take it to arbitration.

That evening on September 3, Rudolph told Smith he

was being discharged under Article 41 and 47 of the Contract.[3] Rudolph testified that at the arbitration hearing, Lee denied that he or McCarthy had ever given Smith authority to void bids.

Smith testified that he previously had voided approximately six bid sheets that had been posted by Respondent. The record is quite clear that the issue of the bid sheets had been an ongoing dispute between the Union and Respondent for many months. Smith testified that the first time he voided a bid was in February, 1976, incident. Rudolph admits having had conversations with Smith in the past about the bidding procedure, but denies being aware of who the individual was who had voided the bids in the past. According to Smith, in February, 1976, when he voided the bid he was asked by Rudolph who was responsible and Smith told him that he, Smith, was responsible. Smith testified further that he could not reach Lee to discuss the bidding procedure in February, and he took it upon himself to write void on the bid. Subsequently, the Company representatives and Lee met and came to an agreement that the bids would be put up with the starting time on them. According to Smith the Respondent did in fact post the bids as agreed upon but apparently sometime thereafter reverted to posting the bids without starting times. Rudolph testified that he made no investigation of a bid that had been voided on August 2, 1976.

Rudolph admitted that the Respondent did not lose any business as a result of the voiding of the bids. Moreover, the record is devoid of any evidence that

[3]Approximately 1 week later when Lee and Smith met with Rudolph, Rudolph told Smith that he was terminated for marking void on the bid sheet.

drivers were late in making their deliveries or failed to make any deliveries.

Paul Tedesco testified on behalf of the Respondent that he was present at a meeting on September 7, 1976, in Mr. Rudolph's office at which Lee and Smith were present. According to his hearsay testimony, in response to a question from Rudolph, Lee replied that he did not give authority to Smith to void the bid.

Smith testified that in May or June, 1976, Rudolph asked him whether he would void the bid sheet if Rudolph posted it that day. Smith asked Rudolph how he was going to post it, to which Rudolph responded the way he had in the past, i.e., no starting times for the roadmen, and no jobs for the citymen except for runs over 25 miles. Smith stated that if Rudolph was going to post them that way it was a departure from past practice and he definitely would void the bid sheet. Rudolph responded, "Well, there's no sense then in me even posting them." Smith testified that on each occasion he discussed voiding of these bids with Lee and with fellow employees.

Analysis and Conclusions

The record clearly demonstrates that Smith was engaged in union and protected concerted activity prior to his discharge on September 3, 1976. It is a violation of Section 8(a)(1) of the Act to discharge an employee who complains about safety matters or other matters encompassed in the collective-bargaining agreement, so long as the employee is acting not only in his own interest, but is attempting to enforce such contract provisions in the interest of other employees in the unit. The record is replete with evidence that Smith was acting on

behalf of other employees and discussed most, if not all, of the complaints including the bidding procedure with co-workers. In *Roadway Express, Inc.*, 217 NLRB 278, the Board held that the Respondent discharged an employee for asserting his Section 7 rights, by insisting on performance of a contract, was in violation of Section 8(a)(1) of the Act. The Board found that the employee was insisting on his contract rights when he refused to drive a tractor. Although the employee acted alone in refusing to drive the tractor, and he did not at the time of his refusal specifically refer to the contract as granting him this right, the Board found that the nature of his complaint has significance and relevance under the contract in the interest to all of the Respondent's employees, whose employment is governed under the contract. The instant case leaves no room for doubt, in that the record contains evidence which is very specific in naming employees that Smith had discussions with.

The Respondent argues that Smith's complaints were personal attacks on Rudolph, calculated to bring him into disrepute, and demonstrations of disloyalty to his employer. Furthermore, Respondent contends Smith was engaged in a personal effort to attain the position of business agent for the local.

In support of these contentions, Respondents cites *N.L.R.B.* v. *Red Top Inc.*, 455 F.2d 721, 79 LRRM 2497 (8th Cir. 1972) and a Supreme Court case, *N.L.R.B.* v. *Local 1229, IBEW (Jefferson Standard Broadcasting Co.*, 346 U.S. 464 (1953)).

In *Red Top Inc.*, the discharge of employees was found to be for cause for the reason that the employees did not press grievances against their manager in good

faith, but instead were engaged in a conspiracy to undermine him. Furthermore, some of the employees lost their protection under the Act as a result of their having threatened bodily harm and physical violence to the local manager.

In *Jefferson Standard Broadcasting*, the Supreme Court found that the discharge of technicians was not violative of the Act, because the technicians had sponsored and distributed handbills making disparaging attacks on the quality of their employer's television broadcasts. Respondent cites these cases in defense of the warning letter which was directed to Smith. It still maintains that the sole cause of Smith's discharge was his voiding of the bids. Smith's activities in regard to sending the letters to the various government agencies, Governors, and his pursuance of the Colon Swain charge, fall far short of the acts engaged in by the employees in the above cases. Perhaps Smith is a litigious individual, but I do not agree with Respondent that he engaged in said activities maliciously, or for the purpose of undermining Respondent or its agent Rudolph. Nor in my opinion did Smith engage in these activities for personal aggrandizement or to enhance his own position.

The warning letter which I view as evidence of anti-union animus was sent to Smith on the heels of the phone calls received by Rudolph from the DOT regarding the snow chains.[4]

---

[4]Rudolph testified that he received the last phone call from Mr. Pratt of the Department of Transportation sometime after August 16, 1976. Smith's phone call to the NLRB although the record is not clear as to the exact date, apparently occurred the end of July or the beginning of August, 1976. Rudolph on the witness stand was quite graphic in his displeasure with Smith over these two incidents. In my view these incidents, and the other complaints re-

The record testimony of Smith, which I credit in all respects, reveals that the various attempts to press the grievances with Business Agent Lee were futile. Accordingly, in my opinion, Smith was not exceeding his authority as shop steward in attempting to discharge his responsibility by representing the unit employees.

Throughout his testimony, Rudolph was vague and inconsistent. Furthermore, on cross-examination, in several instances, I believe Rudolph was feigning ignorance and did understand the questions propounded to him. On several occasions throughout the hearing, Rudolph was prompted, and supplied answers to questions he was asked while on the witness stand, by Respondent's other witnesses and representatives who were present in the hearing room. After being admonished this conduct ceased.

Rudolph maintained throughout the hearing that the sole reason for Smith's discharge was voiding of the bids. Yet he was unable to explain why, if the voiding of the bids was so important, he failed to investigate any of the bids voided in the past, at least two of the bids including those that were voided in February, and August, 1976. Apparently, he did not feel it was important enough to find out who voided those bids, yet he testified he did consider this a serious infraction, serious enough to terminate Smith. With the history of this dispute and its ongoing discussions between Rudolph and Smith, there leaves no doubt in my mind that Rudolph knew throughout and all along who was voiding the bids. Smith, whom I credit over Rudolph,

ferred to in the warning letter to Smith are the reasons Respondent terminated him. Voiding of the bids was merely the reason given, the pretext, to cover up the real reasons for the discharge.

testified that Rudolph questioned him after a bid was voided the first time. Smith admitted his responsibility for voiding the bid. I therefore conclude, that the Respondent discharged Smith in violation of Section 8(a)(1) and (3) of the Act.

I also credit Smith's version that he apprised Rudolph he had been given authority to void the bids. Whether the authority was in written or oral form is immaterial.

There is sufficient evidence in the record in my view for a finding that one basis for Smith's discharge was the filing of the unfair labor practice charge on his own behalf. The warning letter to Smith makes reference to the many complaints sent to government agencies including the National Labor Relations Board. The only letter or complaint sent to the NLRB by Smith prior to the warning letter is the charge filed by him on May 23, 1975. Therefore, this charge is the only thing Respondent could have been referring to in the warning letter. Furthermore, the warning letter to Smith refers to the Colon Swain incident. In my judgment, Section 8(a)(4) is broad enough to afford Smith the protection sanctioned by that section of the Act.[5] These warnings expose Rudolph's motivation and state of mind and furnish the bases for two of the reasons for the discharge. Accordingly, I find that Respondent violated Section 8(a)(4) of the Act.

Respondent argues that the arbitration award is binding and precludes the finding of a violation of the Act. I disagree. There is evidence in the record that the arbitration panel did not consider the unfair labor practice issues in making its decision i.e., they did not entertain

[5]Cf. *First National Bank and Trust Co.*, 209 NLRB 95; *Fugua Homes (Ohio), Inc.*, 211 NLRB 399.

evidence on the subjects of Smith's letters to the various agencies. Apparently Respondent acknowledges this fact, but argues that the panel's refusal to hear this evidence was an expression by the panel that they did not consider that the discharge was based upon, or motivated by, any factors other than Smith's voiding the bids. In so arguing, Respondent is attempting to read the minds of the arbitration panel. Although the forum was available to Smith, he was not allowed to present all of the evidence nor fully litigate the issues. In this regard, see, *Electronic Reproduction Service Corporation,* 213 NLRB 758.

Moreover, the Board stated in *Filmation Associates,* 227 NLRB No. 237 . . . "accordingly we conclude that issues involving Section 8(a)(4) of the Act are solely within the Board's province to decide, we will not apply the *Spielberg*[6] doctrine to such issues."

Therefore, I find that deferral to the panel's decision would be inappropriate.

Respondent, in its answer raised as an affirmative defense, that it was being denied due process of law by reason of being faced with complaints both by the National Labor Relations Board and OSHA, emanating from the same facts.

It also raised as an affirmative defense that the activities in which Smith is alleged to have engaged in occurred more than 6 months prior to the filing of the unfair labor pratice charge, therefore, the matter is barred by Section 10(b) of the Act.

There is no evidence in the record, or before me that Smith filed a charge both with the National Labor Rela-

[6]112 NLRB 1080.

tions Board and OSHA based upon the same set of facts. Additionally, on June 13, 1977, I issued an order granting the motion to reopen the record for the purpose of receiving a document into evidence. This document reflects that the complaint in, RE: *Smith, Paul A.* v. *Wilson Freight Company,* Case No. 1-D-0120-77-2, was withdrawn, and that the withdrawal was approved by the U.S. Department of Labor (OSHA). Thus, Respondent's defense in that regard is without merit.

Section 10(b) of the Act is unambiguous in clearly stating that it is the unfair labor practice, not the employees' concerted or union activity which must be within the 10(b) period. The unfair labor practice in the present case occurred with Smith's discharge on September 3, 1976. Smith filed the unfair labor practice charge based upon this discharge, on October 20, 1976. Therefore, Smith is well within the 10(b) period and I reject Respondent's affirmative defense in this regard.

I therefore find that Smith's discharge constituted a violation of Sections 8(a)(1), (3) and (4) of the Act.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By contacting various government agencies, and officials of various government agencies, and by complaining about working conditions at the Chelmsford terminal, Paul A. Smith engaged in union and concerted activities.

4. By filing a charge with the National Labor Relations Board on his own behalf and by participating in the processing of the charge filed by Colon Swain, Paul A. Smith engaged in conduct protected under Section 8(a)(4) of the Act.

5. By discharging Paul A. Smith, because of his complaints concerning working conditions and his processing of charges with the National Labor Relations Board, Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed to them by Section 7 of the Act thereby engaging in unfair labor practices within the meaning of Sections 8(a)(1), (3) and (4) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent illegally discriminated against Paul A. Smith in violation of Sections 8(a)(1), (3) and (4) of the Act, I shall recommend that Respondent be ordered to offer him immediate and full reinstatement to his former position or, if such position no longer exists, to one which is substantially equivalent thereto, without prejudice to any seniority or other rights and privileges and to make him whole for any loss of pay suffered as a result of his unlawful discharge, with backpay computed as prescribed in *F. W. Woolworth Company,* 90 NLRB 289. Payment of 7 percent interest per annum shall be computed in the manner prescribed by the Board in *Florida Steel Corp.,* 231 NLRB No. 117 (1977).

Upon the foregoing findings of fact, conclusions of

law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:[7]

ORDER

Respondent, Wilson Freight Company its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discharging employees because they engage in union and concerted activity.

(b) Discharging employees because they file charges with the National Labor Relations Board and/or participate in the processing of charges filed by other employees.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to Paul A. Smith immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

(b) Make Paul A. Smith whole for any loss of pay he may have suffered as a result of his unlawful

[7]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

discharge in the manner set forth in the "Remedy" section of this Decision.

(c) Post at its Chelmsford, Massachusetts terminal, copies of the notice marked "Appendix."[8] Copies of said notice to be furnished by the Regional Director for Region 1, shall, after being duly signed by an authorized representative of Respondent, be posted immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Respondent shall take reasonable steps to insure that said notices are not altered, defaced, or covered by any other material.

(d) Preserve, and, upon reasonable request, make available to the Board or its agents, for examining and copying, all payroll records and reports and all other records necessary to ascertain and compute the amount, if any, of backpay due under the terms of this Order. Order.

(e) Notify the Regional Director for Region 1, in writing within 20 days from the date of this Decision, what steps have been taken to comply herewith.

Dated, Washington, D.C. October 6, 1977

Bruce C. Nasdor
Administrative Law Judge

[8]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

FORM NLRB-4727 (9-69) JD-711-77

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A TRIAL IN WHICH ALL PARTIES HAD AN OPPORTUNITY TO PRESENT THEIR EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT AND HAS ORDERED US TO POST THIS NOTICE AND TO CARRY OUT ITS PROVISIONS.

WE WILL NOT discharge employees because they engaged in protected concerted or union activity.

WE WILL NOT discharge employees because they file charges with the National Labor Relations Board or participate in the processing of charges filed by other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer PAUL A. SMITH immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges.

WE WILL make PAUL A. SMITH whole for any loss of pay he may have suffered as a result of the discrimination against him, with interest thereon at 7 percent per annum.

WILSON FREIGHT COMPANY
(Employer)

Dated_____By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE
AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 12th Floor — Keystone Building, 99 High Street, Boston, MA 02110 (Telephone No. (617) 223-3313.)

Supreme Court, U. S.
FILED
MAR 21 1980
MICHAEL RODAK, JR., CLERK

No. 79-1166

In the Supreme Court of the United States

OCTOBER TERM, 1979

PAUL A. SMITH, PETITIONER

v.

WILSON FREIGHT COMPANY AND
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1166

PAUL A. SMITH, PETITIONER

v.

WILSON FREIGHT COMPANY AND
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

---

1. Petitioner, Paul Smith, was employed at the Chelmsford, Massachusetts terminal of Wilson Freight Company (the Company) from May 1967 until his discharge on September 3, 1976 (Pet. App. 42a). During his last four years of employment, he was shop steward for Local Union No. 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) (*ibid.*).

Beginning in 1974 in his capacity as shop steward Smith filed numerous complaints with federal and state officials and agencies regarding working conditions (Pet. App. 4a-10a, 44a-46a). One such complaint involved the settlement of an unfair labor practice charge in which the Company

and the Union agreed that a terminal employee would be reinstated without back pay. In the summer of 1976 Smith contacted the National Labor Relations Board to determine why the charge had not been deemed meritorious, and to protest the settlement. That same summer, it came to the Company's attention that Smith had contacted the Department of Transportation to complain that the Company did not supply snow chains for its trucks during the winter (Pet. App. 10a-11a, 46a-47a). Angered at Smith's involvement in both matters, terminal manager F. X. Rudolph sent a letter to Smith on September 2 informing him that as shop steward his actions were controlled by Article 41 of the New England Supplement and the National Master Freight Agreement,[1] that by filing work-related complaints with government agencies without exhausting the grievance machinery he had violated Article 41, and that the next time he violated the Article he would be discharged (Pet. App. 15a-16a, 42a-43a). The next day, ostensibly as a result of the incident described below, Smith was discharged.

Throughout 1976 there was an ongoing dispute at the Chelmsford terminal regarding the Company's efforts to eliminate bidding by city drivers for routes under 25 miles and posting of starting times for road drivers (Pet. App. 48a). In February and August the Company posted bid sheets reflecting these changes. Smith voided the sheets causing the drivers not to bid on the posted jobs (Pet. App. 11a-12a, 50a). On September 1 Smith voided another bid sheet (Pet. App. 12a, 48a-49a). On September 3 Smith admitted to Rudolph that he had voided the

[1]Article 41 provides that it shall be grounds for discharge for a steward to cause a slowdown or interrupt an employer's business except as authorized by official Union action (Pet. App. 3a n.3).

sheet, but claimed that he had been authorized to do so by the Union (Pet. App. 12a, 49a). Later that morning Union officials told Rudolph that Smith lacked such authority (Pet. App. 13a-14a), and suggested that the drivers bid as requested and that the dispute be resolved by arbitration. That approach proved impractical (Pet. App. 12a, 49a). That afternoon, Rudolph discharged Smith on the ground that he had voided the bid sheet without Union authorization in violation of Article 41 (Pet. App. 12a-13a, 49a-50a). An arbitration panel denied Smith's subsequent grievance challenging the discharge, finding that in voiding the bid sheet he had exceeded his authority as a shop steward. The panel refused to hear any evidence that Smith's discharge might have been motivated by his complaints to government officials and agencies (Pet. App. 16a-17a, 44a, 55a-56a).

2. In response to Smith's subsequent filing of an unfair labor practice charge, the Board found that the Company had discharged Smith because in his capacity as shop steward he had complained to various government agencies regarding working conditions at the Company, and because he had inquired about the Board's processing of a fellow employee's unfair labor practice charge (Pet. App. 51a-55a). The Board also found that in doing so Smith had not exceeded his authority as shop steward because his prior attempts "to press the grievances with [the Union's business agent] were futile" (Pet. App. 54a). The Company's purported reason for discharging Smith—voiding a bid sheet and thereby causing a disruption of operations in violation of Article 41—was found to be pretextual and not a factor motivating the discharge (Pet.

App. 54a-55a).[2] Concluding that the Company had violated Sections 8(a)(1), (3) and (4) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3) and (4), the Board ordered it, *inter alia*, to reinstate Smith with back pay (Pet. App. 58a-60a, 38a).

3. The court of appeals denied enforcement of the Board's order, concluding that Smith had been discharged for violating Article 41 of the collective bargaining agreement and that his complaints to government agencies were not protected activity (Pet. App. 1a-35a). The court agreed with the Board that the arbitration panel's decision was not dispositive of the unfair labor practice charge, but concluded that the panel had established that voiding the bid sheet constituted just cause for discharge under the bargaining agreement (Pet. App. 22a).[3] The Board was free to reject this "objective cause for discharge," said the court, only if it concluded that despite the existence of the legitimate cause Smith would not have been discharged had he not engaged in protected activity (Pet. App. 19a, 22a-23a).

The court then considered Smith's complaints to various government agencies and concluded that, even if the Company had been motivated in part by irritation at Smith's complaint activity, such activity was not protected

[2]The Board refused to defer to the decision of the arbitration panel because the panel had not considered Smith's allegation that his discharge was motivated by Company displeasure at his having filed complaints with the Board and other government agencies (Pet. App. 55a-56a).

[3]The court rejected the Board's conclusion that the Company's failure to discipline Smith for previous incidents of bid voiding showed that its reliance on that infraction was a pretext (Pet. App. 31a-32a).

by Section 7 of the Act (29 U.S.C. 157). The court reasoned that Article 41 of the Agreement required that Smith, while acting as shop steward, first exhaust the grievance procedure set out in the Agreement before filing complaints about working conditions with government agencies, and that the Company could enforce this provision "by confining a steward's formal actions to specified channels" (Pet. App. 26a). The Company's effort to enforce Article 41 was not "conduct destructive of important rights" since the provision fostered a legitimate policy of insuring that stewards represent employees in a manner consistent with the decisions of the bargaining representative (Pet. App. 27a-32a). Consequently, when Smith, acting as shop steward, filed complaints with government agencies without even attempting to exhaust the grievance procedure,[4] he not only violated Article 41 but also engaged in unprotected activity.[5]

[4]The court found the Board's finding that Smith had attempted to exhaust contractual procedures to be unsupported by the evidence (Pet. App. 31a-32a).

[5]The court noted, citing *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978), and *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975), that individual employees have a protected right to file complaints with government agencies, but concluded that here, "[u]nlike the situation in *Alleluia Cushion* and similar cases, the Company's objection was not simply that an employee had gone to OSHA, DOT or elsewhere, but rather that a union steward was acting in defiance of contract limitations upon his powers" (Pet. App. 25a-26a).

4. In the Board's view, the question raised in the petition—whether a union by contract may lawfully waive the statutory right of an employee who is a shop steward to petition government agencies that protect worker health, safety, and other rights—is not presented here. The court below did not hold that Article 41 of the Agreement deprived Smith of his Section 7 right as an employee to petition OSHA, DOT, or any other government agency respecting safety or other matters affecting his working conditions. The court merely held that Article 41 restricted Smith's right to take such action in his capacity as shop steward, and that the Union, by agreement with the Company, could properly require that when acting as a shop steward, rather than as an individual employee, Smith first exhaust the contract grievance procedure (Pet. App. 26a-29a). The Board did not file its own petition for certiorari in this case because the court's decision, so viewed, rests on a narrow ground[6]

---

[6]The Board did not reach this issue—whether Smith's activities would be protected if in derogation of grievance procedures fixed by contract—because it concluded that, in view of the failure of the business agent to act, "Smith was not exceeding his authority as shop steward * * *" (Pet. App. 54a). The court below rejected this finding (note 4, *supra*).

and turns on an interpretation of a particular collective bargaining agreement. However, should the petition be granted, the Board will defend its decision and order.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board

MARCH 1980

DOJ-1980-03